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No. 15-274

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL., PETITIONERS

v.

JOHN HELLERSTEDT, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE TEXAS VALUES AND 3801 LANCASTER FILM PROJECT IN SUPPORT OF THE RESPONDENTS

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QUESTIONS PRESENTED

1. Is the evidence in the record of this case sufficient to prove, by a preponderance of the evidence, that House Bill 2 will unduly burden a "large fraction" of the State's abortion patients?

2. Does the doctrine of res judicata preclude the petitioners' facial challenges to House Bill 2's provisions?

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INTEREST OF AMICI[1]

Texas Values is one of the largest statewide organizations involved in ensuring that every human life is valued. Texas Values routinely provides educational information and resources to protect the health and safety of women and unborn children.

[1] All parties consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amici curiae, their members, or their counsel financed the preparation or submission or this brief.

The 3801 Lancaster Film Project is a group of filmmakers that produced the award-winning documentary, 3801 Lancaster: American Tragedy. 3801 Lancaster is about late-term abortion provider Kermit Gosnell, who was convicted of first-degree murder, manslaughter, and other charges related to his violence toward women and their offspring both inside and outside the womb. The filmmakers behind 3801 Lancaster continue to screen their film in Texas and other states, to educate the public about the need for common-sense health-and-safety regulations for abortion clinics.

The purpose of this amicus brief is two-fold. First, the amicus will explain how the requirements of House Bill 2 are needed to prevent substandard practitioners from opening shop in Texas. The Gosnell episode showed that state agencies can become prone to "regulatory capture" that leads to lax or non-existent enforcement of abortion-safety regulations. HB2's admitting-privileges and ASC requirements address this problem by holding abortion providers accountable to hospital committees and ensuring that every abortion provider in Texas offers the highest standard of care.

Second, this amicus will refute arguments advanced by the petitioners' amici.

SUMMARY OF ARGUMENT

The Kermit Gosnell grand-jury report specifically recommended that States require all abortions to be performed in ambulatory surgical centers. App. 20a ("[A]bortion clinics should be explicitly regulated as ambulatory surgical facilities, so that they are inspected annually and held to the same standards as all other out-

patient procedure centers.") The grand jury also found that "[t]he abhorrent conditions and practices inside Gosnell's clinic are directly attributable to the Pennsylvania Health Department's refusal to treat abortion clinics as ambulatory surgical facilities." App. 101a. These and other findings in the grand-jury report provide ample justification for HB2's provisions.

ARGUMENT

I. THE GOSNELL GRAND-JURY REPORT PROVIDES AMPLE JUSTIFICATION FOR HB2'S REQUIREMENTS

The petitioners' opening brief says nary a word about Kermit Gosnell. Instead, the petitioners declare that "[a]bortion is one of the safest and most common procedures in contemporary medicine," expecting everyone to forget about Gosnell's atrocities and the lax regulations that enabled them. Pet. Br. 3. But the Gosnell grand-jury report powerfully explains the need for HB2's requirements. App. 101a ("The abhorrent conditions and practices inside Gosnell's clinic are directly attributable to the Pennsylvania Health Department's refusal to treat abortion clinics as ambulatory surgical facilities."); Resp. Br. 1–2 (citing the Gosnell grand-jury report). No member of this Court should vote to invalidate HB2 without first reading the grand-jury report that prompted Texas to enact this law.

A. The Gosnell Grand-Jury Report Shows That The Abortion Industry Has Attracted Practitioners Who Are A Menace To Their Patients

When state authorities allow abortion providers to self-regulate, atrocities can ensue. The Gosnell grand-jury report describes the horrifying consequences that arise from insufficient regulatory oversight of abortion providers. The newspaper reports of Gosnell's trial never captured the full extent of his mayhem and carnage. But the grand-jury report describes Gosnell's practices in detail—and it fixes the blame squarely on the State's lax oversight of abortion providers and its failure to regulate abortion clinics as ambulatory surgical centers. App. 101a.

Consider first the conditions of the clinic in which Gosnell performed abortions:

> The clinic reeked of animal urine, courtesy of the cats that were allowed to roam (and defecate) freely. Furniture and blankets were stained with blood. Instruments were not properly sterilized. Disposable medical supplies were not disposed of; they were reused, over and over again. Medical equipment—such as the defibrillator, the EKG, the pulse oximeter, the blood pressure cuff—was generally broken; even when it worked, it wasn't used. The emergency exit was padlocked shut. And scattered throughout, in cabinets, in the basement, in a freezer, in jars and bags and plastic jugs, were fetal remains.

App. 4a. Gosnell would sever the feet of the fetuses that he aborted and stored them in jars. App. 42a–43a. Bags of medical waste were piled in the clinic's basement. App. 23a, 33a. And fetal remains were strewn throughout the clinic—in bags, milk jugs, orange-juice cartons, and cat-food containers. App. 23a. Some were stored in the refrigerator; others were frozen. *Id.*

Gosnell's clinic was staffed with unlicensed and unqualified workers. App. 27a ("Gosnell deliberately hired unqualified staff because he could pay them low wages, often in cash."). He allowed these unqualified and unsupervised staff workers to administer potent and dangerous drugs to his patients. App. 35a. Gosnell also violated a Pennsylvania law requiring abortion clinics to have at least one doctor certified by the American Board of Obstetrics and Gynecology either on staff or as a consultant. App. 28a.

Gosnell would perform late-term abortions by inducing full labor, a painful and dangerous procedure. App. 6a–7a, 26a–27a. Gosnell liked to terminate pregnancies this way "because it made his job easier." App. 27a. When this process produced a live baby—as it often did—Gosnell would complete the "abortion" by cutting the baby's spinal cord with a pair of scissors:

> Gosnell had a simple solution for the unwanted babies he delivered: he killed them. He didn't call it that. He called it "ensuring fetal demise." The way he ensured fetal demise was by sticking scissors into the back of the baby's neck and cutting the spinal cord. He called that "snipping."

> Over the years, there were hundreds of "snippings." Sometimes, if Gosnell was unavailable, the "snipping" was done by one of his fake doctors, or even by one of the administrative staff.

App. 7a. One of the babies killed by "snipping" was Baby Boy B, whose body was found frozen in a one-gallon spring-water bottle. *Id.*; *see also* App. 67a (picture of Baby Boy B). It was common for Gosnell to make jokes after killing babies in this manner. App. 28a, 51a.

Then there is Gosnell's treatment of the women who came to him seeking abortions. He left one of his patients "lying in place for hours" after he had torn her cervix and colon. App. 8a. When her relatives came to the clinic to pick her up, Gosnell refused to allow them in. *Id.* Gosnell's actions caused this patient to lose nearly six inches of her intestines. App. 8a–9a. Gosnell sent another patient home even though he had left fetal parts inside her, causing a serious infection. App. 9a. Another patient suffered a punctured uterus at the hands of Gosnell, yet Gosnell kept her in the clinic for hours afterward, leading to severe blood loss and a hysterectomy. *Id.* Eventually Gosnell's ineptitude and depraved indifference led to the death of a patient. Pet. App. 10a–11a (describing the death of Karnamaya Mongar at Gosnell's hands).

Gosnell is the worst of the substandard abortion practitioners who have killed or wounded their patients and unborn children—but he is far from the only one. Dr. David Benajmin was convicted of second-degree murder after he botched an abortion and allowed the patient to bleed to death while he performed an abortion on a second woman. *See* Lynette Holloway, Abortion Doctor

Guilty of Murder, N.Y. Times, Aug. 9, 1995, available at http://nyti.ms/1P3Y9Ub (last visited Feb. 3, 2016). Benjamin was allowed to perform abortions in New York even though his license had been previously suspended based on 38 counts of negligence and incompetence, and even though the authorities had revoked his license for "gross incompetence and negligence" in five other cases. *Id.* Nevertheless, New York allowed Benjamin to continue practicing medicine as he appealed the revocation. *Id.*

Dr. Abu Hayat cut off the arm of a fetus that he was trying to abort, who was later born alive and healthy (apart from her missing right arm). *See* Richard Perez-Pena, Prison Term for Doctor Convicted in Abortions, N.Y. Times, June 15, 1993, available at http://nyti.ms/1QYCoaF (last visited Feb. 3, 2016). Hayat had been previously accused of botching eight abortions at his clinic, but was never held accountable until one of his patients died after an infection. *See* Steven Lee Myers, Doctor Describes Death of a Girl Who Suffered Botched Abortion, N.Y. Times, December 5, 1991, available at http://nyti.ms/1QYD67O (last visited on Dec. 5, 1991); *see also* Denise Lavoie, Doctor Gets 6 Months in Abortion Patient Death, Associated Press, Sept. 14, 2010 (reporting Dr. Rapin Osathanondh's guilty plea to involuntary manslaughter of a patient who died after her abortion).

The petitioners claim that office-based abortion "has an excellent safety record" without mentioning any of these atrocities. Pet. Br. 17. Yet the deaths and injuries that occurred in these offices were entirely preventable. Gosnell, Benjamin, Hayat, and Osathanondh had no

business practicing medicine in any capacity. But the state authorities allowed these shady characters to perform abortions and took action only after a patient died. HB2's requirements are designed to prevent subpar practitioners from offering services in the first place. Hospital committees will not grant admitting privileges to disreputable physicians, and the ASC requirements ensure that clinics are staffed and equipped to deal with the emergency complications that have claimed the lives of abortion patients. It is unacceptable for a State to simply wait until a patient suffers harm and *then* prosecute the derelict abortion provider after the fact. And it is absurd to argue that the Constitution requires a State to take this wait-and-see approach—rather than take preemptive action to thwart substandard practitioners in a field that has seen its fill of them.

B. The Gosnell Grand-Jury Report Shows That Hospitals And Doctors Fail To Report Complications From Abortions, Even When Required By Law

The plaintiffs acknowledge that major complications can arise during or after an abortion, but they claim that this is rare. Pet. Br. 16 ("Studies consistently report the rate of major complications during or after an abortion as less than one-half of one percent"); *see also id.* at 3 ("Abortion is one of the safest and most common procedures in contemporary medicine."). The State claims that these numbers are inaccurately low because complications from abortions often go unreported. Resp. Br. 35. The Gosnell grand-jury report shows that the State is correct. Not only did Gosnell fail to report the many

complications that arose from his reckless abortion practice, but so did the other medical professionals who treated Gosnell's victims after they left his clinic.

Patients injured by Gosnell often sought treatment from the Hospital of the University of Pennsylvania (HUP) or its subsidiary, Penn Presbyterian Medical Center. App. 16a. One of those victims died at HUP after a botched Gosnell abortion. HUP reported this episode to the authorities, as required by law. *Id.* But many other Gosnell victims came to these hospitals for emergency treatment and hospitalization related to Gosnell's abortions—and neither HUP nor Penn Presbyterian reported *any* of these episodes to state authorities. *Id.* ("[O]ther than the one initial report, Penn could find not a single case in which it complied with its legal duty to alert authorities to the danger. Not even when a second woman turned up virtually dead.").

The plaintiffs want this Court to equate the *reported* rates of complications from abortion with the *actual* rates of complication. But as the State rightly notes, many States do not require reporting of abortion complications, and Whole Woman's Health has itself underreported complications to state authorities. Resp. Br. 35. Yet even in States that *do* require hospitals and medical professionals to report complications from abortions—such as Pennsylvania—the requirement goes unheeded. The Gosnell grand-jury report confirms what is already evident in the record of this case: Complications from abortions often go unreported.

C. The Gosnell Grand-Jury Report Called Out The National Abortion Federation For Failing To Report Gosnell To State Authorities

The National Abortion Federation (NAF) claims that its mission is "to ensure safe, legal, and accessible abortion care, which promotes health and justice for women." NAF Br. 1. Kermit Gosnell applied for membership in NAF shortly after the death of Karnamaya Mongar. App. 16a. In response to this application, NAF inspected Gosnell's clinic and found that Gosnell and his staff failed to keep proper records, failed to explain risks to their patients, failed to monitor their patients, failed to have the proper equipment on hand, and failed to use anesthesia properly. *Id.*; *see also id.* ("It was the worst abortion clinic [the NAF evaluator] had ever inspected."). Although NAF rejected Gosnell's application, it never told anyone in authority about the dangerous conditions at Gosnell's clinic. *Id.*

NAF's amicus brief says nothing about Gosnell or its failure to report Gosnell to state regulators. Nor does it acknowledge the grand jury's recommendation that States require abortions to be performed in ambulatory surgical centers—a recommendation that the grand jury made in part because it found that organizations like NAF cannot be trusted to report miscreant abortion providers to the authorities. App. 16a–17a.

D. The Gosnell Grand-Jury Report Shows How Regulatory Capture Leads To Lax Oversight Of Abortion Clinics

The Pennsylvania Department of Health inspected Gosnell's clinic sporadically between 1978 and 1993—and then never inspected the clinic again until 2010. App. 29a, 69a–74a. But the physical layout of the clinic presented obvious safety hazards even apart from Gosnell's filthy and unsanitary practices. The three-story building had no elevator, and the narrow hallways and multiple twisting stairways made it impossible to transport patients from the operating rooms to the outside by wheelchair or stretcher. App. 29a. This contributed to the death of Karnamaya Mongar, because EMTs were unable to transport her from the clinic after she lost consciousness. Pet. App. 23a, 29a, 46a–47a, 70a–71a. The building never should have been approved as a medical facility—even before Gosnell moved in. App. 28a ("It is unbelievable to us that the Pennsylvania Department of Health approved this building as an abortion facility."); App. 70a (noting that Pennsylvania Department of Health found in its 1979 that there was adequate access for a stretcher, "something that proved not to be the case when EMTs needed to transport Karnamaya Mongar from the facility in November 2009").

The Department of Health continued to issue certificates of approval for Gosnell's clinic even after its inspectors noticed numerous and repeated violations of state law. An inspection from 1989 discovered that Gosnell failed to comply with a state law requiring abortion clinics to have at least one board-certified OB/GYN on staff

or as a consultant. App. 71a. The inspectors also noticed that Gosnell violated state law by failing to provide nurses to oversee the recovery of patients and had no transfer agreement with a hospital for emergency care. *Id.* But the Department approved Gosnell's clinic for another 12 months, based on his promises to fix those problems. *Id.*

In 1992, the Department inspected the clinic again. App. 72a. Still there were no nurses to monitor patient recovery; indeed, the clinic employed no nurses at all. *Id.* Still there was no board-certified OB/GYN on staff or as a consultant. *Id.* But the inspectors concluded that there were "no deficiencies"—and the Department approved Gosnell's clinic to continue performing abortions. *Id.* The inspectors also concluded that there was adequate access for stretchers and wheelchairs, a conclusion that the grand jury found incredible given the narrow hallways and the absence of elevators. *Id.*

After 1993, the Pennsylvania Department of Health decided to stop inspecting abortion clinics. App. 12a. The Gosnell grand jury reported that this change in policy was done "for political reasons":

> With the change of administration from Governor Casey to Governor Ridge, officials concluded that inspections would be "putting a barrier up to women" seeking abortions. Better to leave clinics to do as they pleased, even though, as Gosnell proved, that meant both women and babies would pay.

App. 12a. The only time that the Department would inspect abortion clinics would be in response to complaints,

id., but the Department failed to act even though it received many complaints about Gosnell's clinic. App. 12a, 76a. One the those complaints came from Dr. Donald Schwarz, who noticed that the patients that he referred to Gosnell's clinic were contracting trichomoniasis, a sexually transmitted parasite, as a result of Gosnell's unsanitary practices. App. 76a. Dr. Schwarz stopped referring patients to Gosnell and hand-delivered a complaint to the office of the Pennsylvania Secretary of Health. The State did nothing in response. *Id.* Indeed, the Department failed to investigate Gosnell or inspect his clinic even after Karnamaya Mongar's death. Pet. App. 81a–85a.

The Department of Health's indifference and nonfeasance in response to Gosnell is a prime example of regulatory capture—a phenomenon that occurs when regulators respond to incentives that lead to lax oversight and enforcement. *See, e.g.*, Mancur Olson, *The Logic of Collective Action* (1965); George Stigler, *Theory of Economic Regulation*, 2 Bell J. Econ. 3 (1971). One of the key findings of the Gosnell grand-jury report is that state regulators cannot be trusted to enforce patient-safety laws currently on the books, as they are often content to allow hazards at abortion clinics to go ignored and unaddressed until after a patient dies. As the grand jury explained:

> The travesty, from this Grand Jury's perspective, is that DOH could and should have closed down Gosnell's clinic years before. Many, if not all, of the violations cited in the March 12, 2010, document had been present *for nearly two*

> *decades*. The violations had been apparent when DOH site-reviewers inspected the facility in 1989, 1992, and 1993. Yet it was not until law enforcement discovered the horrendous conditions inside 3801 Lancaster Avenue that DOH took action to close the clinic.

Pet. App. 90a. All the more need for States to take preemptive actions that heighten oversight and accountability. If regulatory capture makes state officials reluctant to inspect clinics or close clinics in response to safety hazards, then States need to enact clear and easy-to-apply rules that will ensure that abortion patients receive the highest standards of care.

E. The Gosnell Grand-Jury Report Specifically Recommended That States Require That All Abortions Be Performed In Ambulatory Surgical Centers

The Gosnell episode illustrates the consequences of unregulated and under-regulated abortion. The grand jury urged States to prevent a repeat of this sordid episode by regulating abortion clinics as ambulatory surgical centers:

> [A]bortion clinics should be explicitly regulated as ambulatory surgical facilities, so that they are inspected annually and held to the same standards as all other outpatient procedure centers.

App. 20a. More significantly, the grand jury found that "[t]he abhorrent conditions and practices inside Gosnell's

clinic *are directly attributable to* the Pennsylvania Health Department's refusal to treat abortion clinics as ambulatory surgical facilities." App. 101a (emphasis added). The report noted the many ways in which Pennsylvania's ASC rules would benefit abortion patients, by requiring measures for infection control, 28 Pa. Code. § 567.3, the use of sterile linens, *id.* at § 567.21–24, and anesthesia protocols, *id.* at § 555.33. App. 105a.

Pennsylvania followed the recommendation of the grand jury and quickly enacted legislation to require abortion clinics to meet the same standards that are applied to ambulatory surgical facilities. *See* 35 Pa. Cons. Stat. § 448.806(h), added by 2011 Pa. Legis. Serv. Act 2011-122, § 2.

F. The Petitioners' Arguments, If Accepted By This Court, Would Invalidate Pennsylvania's Ambulatory-Surgical-Center Law

No one dared challenge Pennsylvania's ambulatory-surgical-requirement in the wake of Gosnell, and the law has been in effect since 2011. But the petitioners' arguments, if accepted by this Court, would invalidate Pennsylvania's ASC law as well as Texas's. According to the petitioners, no State may *ever* require abortions to be performed in ambulatory surgical centers, because such a requirement is "not reasonably designed to promote women's health." Pet. Br. 36; *see also* id. at 17 ("The ASC requirement provides no health benefit to abortion patients."). This would preclude *any* State from enacting an ambulatory-surgical-center requirement—even after Gosnell-like atrocities occur within the State's own borders.

* * *

We have included excerpts from the Gosnell grand-jury report in the appendix to this brief. The entire grand-jury report is available at http://1.usa.gov/1yKslii (last visited Feb. 3, 2016). We respectfully ask the Court to consider the facts and findings in the report—which are a proper subject of judicial notice under Federal Rule of Evidence 201. *See* University Faculty for Life Br. 29.

II. THE ARGUMENTS IN THE PETITIONERS' AMICI BRIEFS ARE MERITLESS

There were over 40 amicus briefs filed in support of the petitioners in this case. We begin with a few general observations about these briefs.

First, not a single amicus attempts to address the State's res judicata defense—even though the court of appeals held that res judicata supplied an independent and sufficient ground for its judgment. Briefs that argue for "reversal" of a court of appeals' judgment, but that address only one of the two independent grounds on which that judgment relies, do not provide an argument for "reversal." Not even the Solicitor General addresses the alternative ground on which the court of appeals relied, even as he tells this Court that the court of appeals' judgment "should be reversed." U.S. Br. 34.

The amici's silence on res judiciata is especially jarring given that the State's res judicata defense is insurmountable—especially on the petitioners' facial challenge to the admitting-privileges requirement, which was litigated and lost in the previous HB2 lawsuit. *See Planned Parenthood of Greater Tex. Surgical Health*

Servs. v. Abbott, 748 F.3d 583, 595 (5th Cir. 2014). Not only is this challenge barred by claim preclusion, it is also barred by *issue* preclusion (collateral estoppel)—and it is waived because the petitioners never brought a facial challenge to the admitting-privileges law in the district court. The petitioners do not present a serious argument to the contrary, Pet. Br. 57–58,[2] and their amici present no argument at all.

Second, none of the amici address the severability requirements in HB2 or its implementing regulations, even though the court of appeals held that these severability requirements precluded total, facial invalidation of the State's ASC rules. Pet. App. 25a, 30a, 68a. HB2's severability clause requires the Court to sever and preserve every valid application of HB2, Pet. App. 200a, and the ASC requirements are clearly constitutional as applied to second-trimester abortions. *See Simopoulos v. Virginia*, 462 U.S. 506 (1983); Resp. Br. 45, 50–52. HB2's implementing rules further provide that "every provision, section, subsection, sentence, clause, phrase, or word in this chapter and each application of the provisions of this chapter remain severable." 25 Tex. Admin. Code § 139.9(b). And the petitioners failed to provide ev-

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[2] The petitioners think that *any* factual change in the State's abortion market allows abortion providers to reinstitute previously rejected facial challenges to abortion regulations—a test that would effectively make res judicata inapplicable in abortion cases. Pet. Br. 57 ("If, as here, a claim rests on facts that developed after the entry of judgment in a prior case, the claim is not barred by the prior judgment and a court may award any remedy that is appropriate.").

idence that *any* provision in the operational-requirements section of the State's ASC rules would cause *any* abortion clinic to close. Pet. App. 25a, 70a, 120a; Resp. Br. 52–53.

The petitioners do not even contest the court of appeals's decision to enforce the severability requirements in HB2 and its implementing regulations, thereby waiving any challenge to the court of appeals's decision to sever the applications of the statute and the discrete provisions of the regulations. Resp. Br. 51. But the petitioners' amici ignore the severability requirements as well, apparently thinking that they can treat the State's ASC rules as a non-severable package that stands or falls together—even though the rules *say* that they are severable and the court of appeals *held* that they are severable. The petitioners and their amici cannot continue in this state of denial. They must identify the specific requirements of section 135.52 that will close abortion clinics, and cite trial evidence proving that these requirements will cause these closures. They cannot make the severability provisions go away by ignoring them. *See Leavitt v. Jane L.*, 518 U.S. 137, 138 (1996) (holding that federal courts must enforce state-law severability provisions in abortion litigation).

Finally, several of the petitioners' amici cite inadmissible hearsay that was never introduced at trial—in violation of the Federal Rules of Evidence and the precedent of this Court. *See* University Faculty for Life Br. 24–32 (collecting authorities); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice 743, 801 (10th ed. 2013) ("It is manifestly im-

proper to bring such [non-record] facts to the Court's attention, either by brief or oral argument, to induce the Court to make a favorable disposition of the case."). Non-record evidence may be cited when it is subject to judicial notice—as the Gosnell grand-jury report clearly is. *See* University Faculty for Life Br. 29–30. And non-record evidence may be cited to show a rational basis for a State's law. *Id.* at 30–31. It is therefore appropriate for this Court to consider the outside-the-record evidence of harms inflicted by reckless and derelict abortion providers. *See supra*, at 4–7. But litigants before this Court cannot blurt out non-record hearsay on a question of adjudicative fact, as the petitioners and several of their amici have done. *See* Pet. Br. 26; ACOG Br.; NAF Br; Planned Parenthood Br. Litigants and amici who challenge abortion laws do not get special dispensations from the Federal Rules of Evidence.

We will now address some of the individual amicus briefs in more detail.

A. The National Abortion Federation Amicus

The NAF amicus refuses to acknowledge its 2000 "guide to good care" for women seeking abortions, which issued the following advice:

> Make sure the person performing the abortion has these qualifications:
>
> - She or he should be a physician who is licensed by the state. In a few states, other medical professionals may perform abortions legally.

- In the case of emergency, *the doctor should be able to admit patients to a nearby hospital* (no more than 20 minutes away).

See NAF, "Having An Abortion? Your Guide To Good Care" (2000), available at http://bit.ly/2068uSo (last visited Feb. 3, 2016) (emphasis added). The fifth circuit relied explicitly on NAF's 2000 recommendation when it rejected a facial challenge to HB2's admitting-privileges requirement in the previous HB2 lawsuit. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 595 (5th Cir. 2014); *see also* Resp. Br. 36. NAF never explains how a State violates the Constitution by codifying an admitting-privileges requirement that NAF itself endorsed as a necessary patient-safety measure.

NAF's brief also violates the Rules of Evidence by making hearsay assertions that are not in the record of this case. The allegations about the Routh Street clinic are outside the record, and the State has had no opportunity to depose or cross-examine the "witnesses" who produced this information. Nor are any of these statements sworn. The "stories" that NAF relates on pages 25–30 are patently inadmissible, as are the post-trial TexPEP studies that NAF cites. *See* University Faculty for Life Br. 24–32.

B. The ACLU Amicus

The findings that district courts made in cases challenging other States' admitting-privileges laws have no relevance to this case—especially when the petitioners' facial challenge to HB2's admitting-privileges law is so

obviously barred by res judicata and collateral estoppel. The district court in this case made no finding that the State's admitting-privileges law would undermine patient health, and the petitioners presented no evidence on this issue because they did not bring a facial challenge to the State's admitting-privileges law. Appellate courts do not make factual determinations based on evidence introduced in other cases.

The ACLU and the district courts are wrong to say that HB2's admitting-privileges law fails to further the State's interest in patient health. The admitting-privileges law will prevent substandard practitioners like Gosnell (and others) from performing abortions, because hospitals will not grant admitting privileges to disreputable practitioners. If Pennsylvania had enforced such a law before 2009, then Karnamaya Mongar would be alive today. HB2's admitting-privileges law also advances the State's interest in fetal life by protecting fetuses from practitioners like Gosnell and Abu Hayat. *See supra* at 5–7; Resp. Br. 24. The ACLU is flatly wrong to say that the *only* possible interest advanced by HB2 is women's health. ACLU Br. 2.

Finally, the ACLU's argument is incompatible with *Mazurek v. Armstrong*, 520 U.S. 968 (1997), which it does not cite. *Mazurek* upheld a law forbidding non-physicians to perform abortions, even though a study had shown that physician-assistants could perform abortions without any increased risk to patient safety. *Id.* at 973. This Court held that the study was irrelevant because "the Constitution gives the States broad latitude to decide that particular functions may be performed only

by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others.*" *Id.* at 973 (citation omitted).

C. The ACOG Amicus

The ACOG brief cites many medical sources, but none of them were introduced as part of the trial record in this case. And ACOG cites no authority that would allow the Court to consider this non-record material. Under *Casey*, the petitioners must prove based on the *evidence in the record* that HB2 will impose "undue burdens" on abortion patients. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) ("[T]here is *no evidence on this record* that the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion ") (emphasis added).

The ACOG brief is a backdoor (and unlawful) attempt to supplement the trial record with hearsay that was never subjected to cross-examination or any other requirements of the Federal Rules of Evidence. The petitioners and their amici cannot evade their obligation to prove facts at trial by funneling post-trial evidence through an appellate amicus brief. The trial record is closed, and it is too late for the petitioners to add new material through their amici. University Faculty for Life Br. 24–32.

D. The Planned Parenthood Amicus

Yet another amicus brief permeated with inadmissible hearsay that was never introduced at trial and is not part of the record in this case. The newspaper articles that Planned Parenthood cites to support its factual

claims are patently improper for this Court to consider. *See New Haven Inclusion Cases*, 399 U.S. 392, 450, n.66 (1970) ("Both sides point to newspaper articles in support of their arguments. None of this is record evidence, and we do not consider it.").

Planned Parenthood also makes numerous factual assertions about its efforts to build ASCs and the effects of HB2. Planned Parenthood Br. 7–20. But none of that is in the record. And the petitioners needed to put this in the record so that the State would have an opportunity to depose and cross-examine the witnesses of these alleged facts. Planned Parenthood was not a party to this case, and the petitioners introduced no evidence regarding Planned Parenthood's ability to comply with HB2. The State was not even on notice that Planned Parenthood would try to introduce "evidence" for the first time on appeal. Had it known, the State might have taken discovery from Planned Parenthood on these factual questions. Planned Parenthood's decision to sit out the case and spring these allegations in an appellate brief is sandbagging and it should not be tolerated.

In all events, none of this covers up the petitioners' failure to prove at trial that the State's non-ASC clinics will go out of business rather than re-locate into an ASC after HB2 takes full effect. Resp. Br. 10 n.3; University Faculty for Life Br. 5, 16–18. The petitioners want this Court simply to assume that this will happen, but there is no evidence in the record that Planned Parenthood or any of the non-party abortion providers will close rather than move into an ASC after the law takes effect. The

plaintiffs bear the burden of proof, and they failed to produce evidence on this question. *Id.*

E. The New York Amicus

New York's amicus brief opens with a bold claim: "The Undue-Burden Standard Forbids Abortion Regulations That Purport to Promote Women's Health but Actually Fail to Do So." NY Br. 7. If this claim were true, then *Mazurek* was wrongly decided and must be overruled. It was undisputed in that case that physician-assistants could perform abortions without any increased risk to patient safety, and and the plaintiffs had produced empirical evidence showing this to be true. *See* 520 U.S. at 973. But this Court held that the evidence didn't matter: "[T]he Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others.*" *Id.* (citation omitted).

New York's claim is also contradicted by *Casey*, which upheld a statute requiring a physician (rather than a qualified assistant) to provide the information relevant to a woman's informed consent. 505 U.S. at 884–85. In *Casey* (as in *Mazurek*), the plaintiffs argued that this requirement failed to advance women's health because anyone can communicate the required information. *Id.* Yet in *Casey* (as in *Mazurek*), this Court rejected the argument, holding that States may require physicians to communicate the information even if there is no health benefit to requiring a physician rather than a qualified assistant to do so. *Id.*

New York does not even mention *Mazurek*, nor does it mention *Casey*'s decision to uphold Pennsylvania's informed-consent statute—perhaps hoping that its decision to ignore these cases will induce others to ignore them as well. But the State relies on each of these authorities, so they cannot be so easily swept under the rug. Resp. Br. 15, 24–25, 27. If New York wanted to present a serious argument to this Court, it would confront rather ignore *Mazurek*. *See* US Br. 17. A court of law cannot simply disregard inconvenient precedents like *Mazurek*, as New York has done.

Finally, New York's claim that HB2 will "fail" to promote women's health falls flat when one considers New York's own failures to protect its residents from substandard abortion practitioners like David Benjamin and Abu Hayat. Before David Benjamin left one of his patients to bleed to death after a bungled abortion, his license had already been revoked for "gross incompetence and negligence" in five other cases—yet New York allowed him to continue providing abortions while he appealed the revocation. *See supra*, at 7. Before Dr. Abu Hayat cut off the arm of a fetus and caused the death of one of his patients, he had been previously accused of botching eight abortions at his clinic. *See supra*, at 7. But New York's actions against Hayat came too late to save his patient's life—or the right arm of the fetus that he maimed.

To New York's credit, it did prosecute Benjamin and Hayat after they had killed someone. But New York failed to prevent these unscrupulous practitioners from harming their patients in the first place. New York may

be content with a regulatory regime that waits for problems to occur and then punishes the wrongdoers after the fact. But Texas prefers a regime that prevents substandard practitioners from harming their patients in the first place. New York cannot plausibly claim that Texas's choice "fails" to protect the health of women.

F The Constitutional Law Scholars Amicus

This document is signed by constitutional-law scholars, but it is not a work of scholarship. None of the signatories claim to have read the trial record in this case. And none of them have any expertise on what the "undue burden" test means.[3] Their brief does nothing but express a wish that the Court interpret the undue-burden

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[3] One of the law-professor signatories defamed the five members of this Court who joined the majority in *Gonzales v. Carhart*, 550 U.S. 124 (2007), accusing them of allowing their Catholic faith to control their decisionmaking:

> What, then, explains this decision? Here is a painfully awkward observation: All five justices in the majority in *Gonzales* are Catholic. The four justices who are either Protestant or Jewish all voted in accord with settled precedent. It is mortifying to have to point this out. But it is too obvious, and too telling, to ignore. . By making this judgment, these justices have failed to respect the fundamental difference between religious belief and morality. To be sure, this can be an elusive distinction, but in a society that values the separation of church and state, it is fundamental.

Geoffrey R. Stone, Our Faith-Based Justices, HuffPost Politics (April 20, 2007), available at http://huff.to/1j32GcS (last visited Feb. 3, 2016).

test in a manner most conducive to a pro-abortion-rights ideology. But that is a wish, not an argument.

The law professors' brief repeatedly invokes the word "dignity" as if it were some sort of talisman—perhaps because that word featured so prominently in last term's ruling in *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015). But the law professors do not address the dignity of women who suffered at the hands of Kermit Gosnell. Nor do they address the dignity of the human fetuses and babies that Gosnell dismembered and stored in jars and cat-food containers. And they do not consider the dignity of other women who seek abortions from sub-standard practitioners. The law professors who signed this brief have access to the highest-quality health care and will never need to seek services from abortion mills. Others are not as fortunate. Gosnell's victims went to his clinic because they had nowhere else to go. App. 5a ("Gosnell catered to the women who couldn't get abortions elsewhere"). Those women have dignity too.

G. The Solicitor General's Amicus

The Solicitor General's brief gets off to a bad start when it falsely asserts that licensed abortion facilities are excluded from "grandfathering" and "waivers" that the State extends to other ASCs. US Br. 3–4. There is no discrepancy at all between how the State treats abortion clinics and other buildings licensed as ASCs. This is explained in the State's brief, and explained in further detail by one of the State's amici. Resp. Br. 4–5; University Faculty for Life Br. 23–24. There is no need to repeat what those briefs have already said. The Solicitor General mischaracterizes the State's grandfathering rules,

and the court of appeals correctly held that "ASCs that provide abortions are treated no differently than any other ASC" when it comes to waivers and grandfathering. Pet. App. 45a.

The Solicitor General claims that the provisions of HB2 "do not produce actual health benefits," but the Gosnell grand jury concluded otherwise—as did the National Abortion Federation when it recommended in 2000 that abortion patients "make sure" that their doctor is "able to admit patients to a nearby hospital (no more than 20 minutes away." *Supra*, at 19–20. The State is entitled to adopt the views of the Gosnell grand jury and the National Abortion Federation rather than the views of the Solicitor General or the district court. Federal courts are not to serve as "the country's ex officio medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *Gonzales*, 550 U.S. at 164 (citation omitted). In all events, the Solicitor General's claim that HB2's provisions "do not produce actual health benefits" is hard to maintain in the wake of Gosnell. Does the Solicitor General think that Pennsylvania's ASC requirement is unconstitutional?

There is another problem with the Solicitor General's claim that the provisions of HB2 "do not produce actual health benefits": Laws that allow only licensed physicians to perform abortions do not produce health benefits either. In *Mazurek*, the plaintiffs produced a study showing that abortions performed by physician-assistants were as safe as abortions performed by licensed physicians. *See* 520 U.S. at 973. But the Court

upheld the statute. Many of the provisions upheld in *Casey* likewise did not provide "actual health benefits," such as the 24-hour waiting period, the parental-notification requirement, and the requirement that a licensed physician deliver the informed-consent information.

The Solicitor General's efforts to distinguish *Mazurek* are unavailing. US Br. 17. He claims that "a law barring a person who lacks any medical training from performing abortions for others likely carries substantial benefits." *Id.* But physician-only laws do not simply prohibit persons who lack *any* medical training from performing abortions—they prohibit nurses, physicians assistants, and other medically trained individuals who can clearly perform abortions with the same level of safety as a licensed physician. And the plaintiffs in *Mazurek* introduced a study showing that physicians assistants could perform abortions without any added risks to the patients. *See* 520 U.S. at 973. Yet the Court held that the study was irrelevant. Abortion regulations need not be "medically necessary"; otherwise the physician-only law in *Mazurek* should have been struck down—at least as applied to qualified physician assistants.

The Solicitor General then insists on total, facial invalidation of both the ASC and admitting-privileges requirement, even though this remedy is clearly precluded by res judicata and the severability requirements in both HB2 and its implementing regulations. Resp Br. 17–20, 50–53. The Solicitor General says nothing at all about HB2's severability provisions—even though the court of appeals held that the precedent of this Court requires

them to be enforced. Pet. App. 68a (citing *Leavitt v. Jane L.*, 518 U.S. 137 (1996)). If the Solicitor General thinks the severability provisions are unenforceable, or if he thinks that this Court should overrule *Leavitt v. Jane L.*, then he should say so. If he thinks that the severability clauses are enforceable, then he should explain how total, facial invalidation can be the appropriate remedy in the teeth of these severability requirements. Pretending that the severability provisions do not exist is not an option—especially after the court of appeals explicitly relied on the severability requirements to reject the petitioners' facial challenges to HB2.

Then there is the Solicitor General's silence on res judicata—which supplied an independent and alternative basis for the court of appeals' judgment. Pet. App. 35a–42a. If the Solicitor General wants this Court to "reverse" the court of appeals' judgment, as he requests at the end of his brief, then he must at least assert (if not explain) that the court of appeals erred on *both* the res judicata question *and* the merits of the undue-burden inquiry. If the Solicitor General is unwilling to challenge the court of appeals' holdings on res judicata, then he should be asking this Court to affirm, not reverse—at least with regard to the petitioners' facial challenges.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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February 3, 2016

APPENDIX

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

IN RE **MISC. NO. 0009901-2008**
COUNTY
INVESTIGATING
GRAND JURY XXIII

REPORT OF THE GRAND JURY

R. SETH WILLIAMS
District Attorney

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

IN RE **MISC. NO. 0009901-2008**
COUNTY
INVESTIGATING
GRAND JURY XXIII

FINDINGS AND ORDER

AND NOW, this 14th day of January, 2011, after having examined the Report and Records of the County Investigating Grand Jury XXIII, this Court finds that the Report is within the authority of the Investigating Grand Jury and is otherwise in accordance with the provisions of the Investigating Grand Jury Act, 42 Pa. C.S. §4541, et seq. In view of these findings, the Court hereby accepts the Report and refers it to the Clerk of Court for filing as a public record.

BY THE COURT:

/s/ Renee Cardwell Hughes
RENEE CARDWELL HUGHES
Supervising Judge
Court of Common Pleas

Section I: Overview

This case is about a doctor who killed babies and endangered women. What we mean is that he regularly and illegally delivered live, viable, babies in the third trimester of pregnancy – and then murdered these newborns by severing their spinal cords with scissors. The medical practice by which he carried out this business was a filthy fraud in which he overdosed his patients with dangerous drugs, spread venereal disease among them with infected instruments, perforated their wombs and bowels – and, on at least two occasions, caused their deaths. Over the years, many people came to know that something was going on here. But no one put a stop to it.

Let us say right up front that we realize this case will be used by those on both sides of the abortion debate. We ourselves cover a spectrum of personal beliefs about the morality of abortion. For us as a criminal grand jury, however, the case is not about that controversy; it is about disregard of the law and disdain for the lives and health of mothers and infants. We find common ground in exposing what happened here, and in recommending measures to prevent anything like this from ever happening again.

The "Women's Medical Society"

That was the impressive-sounding name of the clinic operated in West Philadelphia, at 38th and Lancaster, by Kermit B. Gosnell, M.D. Gosnell seemed impressive as well. A child of the neighborhood, Gosnell spent almost

four decades running this clinic, giving back – so it appeared – to the community in which he continued to live and work.

But the truth was something very different, and evident to anyone who stepped inside. The clinic reeked of animal urine, courtesy of the cats that were allowed to roam (and defecate) freely. Furniture and blankets were stained with blood. Instruments were not properly sterilized. Disposable medical supplies were not disposed of; they were reused, over and over again. Medical equipment – such as the defibrillator, the EKG, the pulse oximeter, the blood pressure cuff – was generally broken; even when it worked, it wasn't used. The emergency exit was padlocked shut. And scattered throughout, in cabinets, in the basement, in a freezer, in jars and bags and plastic jugs, were fetal remains. It was a baby charnel house.

The people who ran this sham medical practice included no doctors other than Gosnell himself, and not even a single nurse. Two of his employees had been to medical school, but neither of them were licensed physicians. They just pretended to be. Everyone called them "Doctor," even though they, and Gosnell, knew they weren't. Among the rest of the staff, there was no one with any medical licensing or relevant certification at all. But that didn't stop them from making diagnoses, performing procedures, administering drugs.

Because the real business of the "Women's Medical Society" was not health; it was profit. There were two primary parts to the operation. By day it was a prescription mill; by night an abortion mill. A constant stream of

"patients" came through during business hours and, for the proper payment, left with scripts for Oxycontin and other controlled substances, for themselves and their friends. Gosnell didn't see these "patients"; he didn't even show up at the office during the day. He just left behind blank, pre-signed prescription pads, and had his unskilled, unauthorized workers take care of the rest. The fake prescriptions brought in hundreds of thousands of dollars a year. But this drug-selling operation is the subject of separate investigation by federal authorities. Our focus was on the other side of the business.

Murder In Plain Sight

With abortion, as with prescriptions, Gosnell's approach was simple: keep volume high, expenses low – and break the law. That was his competitive edge.

Pennsylvania, like other states, permits legal abortion within a regulatory framework. Physicians must, for example, provide counseling about the nature of the procedure. Minors must have parental or judicial consent. All women must wait 24 hours after first visiting the facility, in order to fully consider their decision. But Gosnell's compliance with such requirements was casual at best. At the Women's Medical Society, the only question that really mattered was whether you had the cash. Too young? No problem. Didn't want to wait? Gosnell provided same-day service.

The real key to the business model, though, was this: Gosnell catered to the women who couldn't get abortions elsewhere – because they were too pregnant. Most doctors won't perform late second-trimester abortions, from approximately the 20th week of pregnancy, because of

the risks involved. And late-term abortions after the 24th week of pregnancy are flatly illegal. But for Dr. Gosnell, they were an opportunity. The bigger the baby, the more he charged.

There was one small problem. The law requires a measurement of gestational age, usually done by an ultrasound. The ultrasound film would leave documentary proof that the abortion was illegal. Gosnell's solution was simply to fudge the measurement process. Instead of hiring proper ultrasound technicians, he "trained" the staff himself, showing them how to aim the ultrasound probe at an angle to make the fetus look smaller. If one of his workers nonetheless recorded an ultrasound measurement that was too big, it would just be redone. Invariably these second ultrasounds would come in lower. In fact, almost every time a second ultrasound was taken, the gestational age would be recorded as precisely 24.5 weeks – slightly past the statutory cutoff. Apparently Gosnell thought he would get away with abortions that were just a little illegal. In reality, of course, most of these pregnancies were considerably more advanced.

But the illegal abortion business also posed an additional dilemma. Babies that big are hard to get out. Gosnell's approach, whenever possible, was to force full labor and delivery of premature infants on ill-informed women. The women would check in during the day, make payment, and take labor-inducing drugs. The doctor wouldn't appear until evening, often 8:00, 9:00, or 10:00 p.m., and only then deal with any of the women who were ready to deliver. Many of them gave birth before he even got there. By maximizing the pain and danger for his pa-

tients, he minimized the work, and cost, for himself and his staff. The policy, in effect, was labor without labor.

There remained, however, a final difficulty. When you perform late-term "abortions" by inducing labor, you get babies. Live, breathing, squirming babies. By 24 weeks, most babies born prematurely will survive if they receive appropriate medical care. But that was not what the Women's Medical Society was about. Gosnell had a simple solution for the unwanted babies he delivered: he killed them. He didn't call it that. He called it "ensuring fetal demise." The way he ensured fetal demise was by sticking scissors into the back of the baby's neck and cutting the spinal cord. He called that "snipping."

Over the years, there were hundreds of "snippings." Sometimes, if Gosnell was unavailable, the "snipping" was done by one of his fake doctors, or even by one of the administrative staff. But all the employees of the Women's Medical Society knew. Everyone there acted as if it wasn't murder at all.

Most of these acts cannot be prosecuted, because Gosnell destroyed the files. Among the relatively few cases that could be specifically documented, one was Baby Boy A. His 17-year-old mother was almost 30 weeks pregnant – seven and a half months – when labor was induced. An employee estimated his birth weight as approaching six pounds. He was breathing and moving when Dr. Gosnell severed his spine and put the body in a plastic shoebox for disposal. The doctor joked that this baby was so big he could "walk me to the bus stop." Another, Baby Boy B, whose body was found at the clinic frozen in a one-gallon spring-water bottle, was at least 28

weeks of gestational age when he was killed. Baby C was moving and breathing for 20 minutes before an assistant came in and cut the spinal cord, just the way she had seen Gosnell do it so many times.

And these were not even the worst cases. Gosnell made little effort to hide his illegal abortion practice. But there were some, "the really big ones," that even he was afraid to perform in front of others. These abortions were scheduled for Sundays, a day when the clinic was closed and none of the regular employees were present. Only one person was allowed to assist with these special cases – Gosnell's wife. The files for these patients were not kept at the office; Gosnell took them home with him and disposed of them. We may never know the details of these cases. We do know, however, that, during the rest of the week, Gosnell routinely aborted and killed babies in the sixth and seventh month of pregnancy. The Sunday babies must have been bigger still.

Butcher Of Women

Dr. Gosnell didn't just kill babies. He was also a deadly threat to mothers. Not every abortion could be completed by inducing labor and delivery. On these occasions, Gosnell would attempt to remove the fetus himself. The consequences were often calamitous – though that didn't stop the doctor from trying to cover them up.

One woman, for example, was left lying in place for hours after Gosnell tore her cervix and colon while trying, unsuccessfully, to extract the fetus. Relatives who came to pick her up were refused entry into the building; they had to threaten to call the police. They eventually found her inside, bleeding and incoherent, and trans-

ported her to the hospital, where doctors had to remove almost half a foot of her intestines.

On another occasion, Gosnell simply sent a patient home, after keeping her mother waiting for hours, without telling either of them that she still had fetal parts inside her. Gosnell insisted she was fine, even after signs of serious infection set in over the next several days. By the time her mother got her to the emergency room, she was unconscious and near death.

A nineteen-year-old girl was held for several hours after Gosnell punctured her uterus. As a result of the delay, she fell into shock from blood loss, and had to undergo a hysterectomy.

One patient went into convulsions during an abortion, fell off the procedure table, and hit her head on the floor. Gosnell wouldn't call an ambulance, and wouldn't let the woman's companion leave the building so that he could call an ambulance.

Undoubtedly there were many similar incidents, but even they do not demonstrate Gosnell at his most dangerous. Day in and day out, the greatest risks came when the doctor wasn't even there. Gosnell set up his practice to rely entirely on the untrained actions of his unqualified employees. They administered drugs to induce labor, often causing rapid and painful dilation and contractions. But Gosnell did not like it when women screamed or moaned in his clinic, so the staff was under instruction to sedate them into stupor. Of course his assistants had no idea how to manage the powerful narcotics they were using. Gosnell prepared a list of preset dosage levels to be administered in his absence. But no

allowances were made for individual patient variations, or for any monitoring of vital signs. All that mattered was the money. The more you paid, the more pain relief you received. It was all completely illegal, and completely unsafe.

Only in one class of cases did Gosnell exercise any real care with these dangerous sedatives. On those rare occasions when the patient was a white woman from the suburbs, Gosnell insisted that he be consulted at every step. When an employee asked him why, he said it was "the way of the world."

Karnamaya Mongar was not one of the privileged patients. She was a 41-year-old, refugee who had recently come to the United States from a resettlement camp in Nepal. When she arrived at the clinic, Gosnell, as usual, was not there. Office workers had her sign various forms that she could not read, and then began doping her up. She received repeated unmonitored, unrecorded intravenous injections of Demerol, a sedative seldom used in recent years because of its dangers. Gosnell liked it because it was cheap.

After several hours, Mrs. Mongar simply stopped breathing. When employees finally noticed, Gosnell was called in and briefly attempted to give CPR. He couldn't use the defibrillator (it was broken); nor did he administer emergency medications that might have restarted her heart. After further crucial delay, paramedics finally arrived, but Mrs. Mongar was probably brain dead before they were even called. In the meantime, the clinic staff hooked up machinery and rearranged her body to

make it look like they had been in the midst of a routine, safe abortion procedure.

Even then, there might have been some slim hope of reviving Mrs. Mongar. The paramedics were able to generate a weak pulse. But, because of the cluttered hallways and the padlocked emergency door, it took them over twenty minutes just to find a way to get her out of the building. Doctors at the hospital managed to keep her heart beating, but they never knew what they were trying to treat, because Gosnell and his staff lied about how much anesthesia they had given, and who had given it. By that point, there was no way to restore any neurological activity. Life support was removed the next day. Karnamaya Mongar was pronounced dead.

See No Evil

Pennsylvania is not a third-world country. There were several oversight agencies that stumbled upon and should have shut down Kermit Gosnell long ago. But none of them did, not even after Karnamaya Mongar's death. In the end, Gosnell was only caught by accident, when police raided his offices to seize evidence of his illegal prescription selling. Once law enforcement agents went in, they couldn't help noticing the disgusting conditions, the dazed patients, the discarded fetuses. That is why the complete regulatory collapse that occurred here is so inexcusable. It should have taken only one look.

The first line of defense was the Pennsylvania Department of Health. The department's job is to audit hospitals and outpatient medical facilities, like Gosnell's, to make sure that they follow the rules and provide safe care. The department had contact with the Women's

Medical Society dating back to 1979, when it first issued approval to open an abortion clinic. It did not conduct another site review until 1989, ten years later. Numerous violations were already apparent, but Gosnell got a pass when he promised to fix them. Site reviews in 1992 and 1993 also noted various violations, but again failed to ensure they were corrected.

But at least the department had been doing something up to that point, however ineffectual. After 1993, even that pro forma effort came to an end. Not because of administrative ennui, although there had been plenty. Instead, the Pennsylvania Department of Health abruptly decided, for political reasons, to stop inspecting abortion clinics at all. The politics in question were not anti-abortion, but pro. With the change of administration from Governor Casey to Governor Ridge, officials concluded that inspections would be "putting a barrier up to women" seeking abortions. Better to leave clinics to do as they pleased, even though, as Gosnell proved, that meant both women and babies would pay.

The only exception to this live-and-let-die policy was supposed to be for complaints dumped directly on the department's doorstep. Those, at least, would be investigated. Except that there were complaints about Gosnell, repeatedly. Several different attorneys, representing women injured by Gosnell, contacted the department. A doctor from Children's Hospital of Philadelphia hand-delivered a complaint, advising the department that numerous patients he had referred for abortions came back from Gosnell with the same venereal disease. The medical examiner of Delaware County informed the depart-

ment that Gosnell had performed an illegal abortion on a 14-year-old girl carrying a 30-week-old baby. And the department received official notice that a woman named Karnamaya Mongar had died at Gosnell's hands.

Yet not one of these alarm bells – not even Mrs. Mongar's death – prompted the department to look at Gosnell or the Women's Medical Society. Only after the raid occurred, and the story hit the press, did the department choose to act. Suddenly there were no administrative, legal, or policy barriers; within weeks an order was issued to close the clinic. And as this grand jury investigation widened, department officials "lawyered up," hiring a high-priced law firm to represent them at taxpayer expense. Had they spent as much effort on inspection as they did on attorneys, none of this would have happened to begin with.

But even this total abdication by the Department of Health might not have been fatal. Another agency with authority in the health field, the Pennsylvania Department of State, could have stopped Gosnell singlehandedly. While the Department of Health regulates facilities, the Department of State, through its Board of Medicine, licenses and oversees individual physicians. Like their colleagues at Health, however, Department of State officials were repeatedly confronted with evidence about Gosnell, and repeatedly chose to do nothing.

Indeed, in many ways State had more damning information than anyone else. Almost a decade ago, a former employee of Gosnell presented the Board of Medicine with a complaint that laid out the whole scope of his operation: the unclean, unsterile conditions; the unli-

censed workers; the unsupervised sedation; the underage abortion patients; even the over-prescribing of pain pills with high resale value on the street. The department assigned an investigator, whose investigation consisted primarily of an offsite interview with Gosnell. The investigator never inspected the facility, questioned other employees, or reviewed any records. Department attorneys chose to accept this incomplete investigation, and dismissed the complaint as unconfirmed.

Shortly thereafter the department received an even more disturbing report – about a woman, years before Karnamaya Mongar, who died of sepsis after Gosnell perforated her uterus. The woman was 22 years old. A civil suit against Gosnell was settled for almost a million dollars, and the insurance company forwarded the information to the department. That report should have been all the confirmation needed for the complaint from the former employee that was already in the department's possession. Instead, the department attorneys dismissed this complaint too. They concluded that death was just an "inherent" risk, not something that should jeopardize a doctor's medical license.

The same thing happened at least twice more: the department received complaints about lawsuits against Gosnell, but dismissed them as meaningless. A department attorney said there was no "pattern of conduct." He never bothered to check a national litigation database, which would have shown that Gosnell had paid out damages to at least five different women whose internal organs he had punctured during abortions. Apparently, the missing piece in the "pattern" was press coverage.

Once that began, after the raid, the department attorney quickly managed to secure a license suspension against Gosnell.

Similar inaction occurred at the municipal level. The Philadelphia Department of Public Health does not regulate doctors or medical facilities; but it is supposed to protect the public's health. Philadelphia health department employees regularly visited the Women's Medical Society to retrieve blood samples for testing purposes, but never noticed, or more likely never bothered to report, that anything was amiss. Another employee inspected the clinic in response to a complaint that dead fetuses were being stored in paper bags in the employees' lunch refrigerator. The inspection confirmed numerous violations of protocols for storage and disposal of infectious waste. But no follow-up was ever done, and the violations continued to the end.

A health department representative also came to the clinic as part of a citywide vaccination program. She promptly discovered that Gosnell was scamming the program; more importantly, she was the only employee, city or state, who actually tried to do something about the appalling things she saw there. By asking questions and poking around, she was able to file detailed reports identifying many of the most egregious elements of Gosnell's practice. It should have been enough to stop him. But instead her reports went into a black hole, weeks before Karnamaya Mongar walked into the Woman's Medical Society.

Ironically, the doctor at CHOP who personally complained to the Pennsylvania Department of Health about

the spread of venereal disease from Gosnell's clinic, the doctor who used to refer teenage girls to Gosnell for abortions, became the head of the city's health department two years ago. But nothing changed in the time leading up to Mrs. Mongar's death. And it wasn't just government agencies that did nothing. The Hospital of the University of Pennsylvania and its subsidiary, Penn Presbyterian Medical Center, are in the same neighborhood as Gosnell's office. State law requires hospitals to report complications from abortions. A decade ago, a Gosnell patient died at HUP after a botched abortion, and the hospital apparently filed the necessary report. But the victims kept coming in. At least three other Gosnell patients were brought to Penn facilities for emergency surgery; emergency room personnel said they have treated many others as well. And at least one additional woman was hospitalized there after Gosnell had begun a flagrantly illegal abortion of a 29-week-old fetus. Yet, other than the one initial report, Penn could find not a single case in which it complied with its legal duty to alert authorities to the danger. Not even when a second woman turned up virtually dead.

So too with the National Abortion Federation. NAF is an association of abortion providers that upholds the strictest health and legal standards for its members. Gosnell, bizarrely, applied for admission shortly after Karnamaya Mongar's death. Despite his various efforts to fool her, the evaluator from NAF readily noted that records were not properly kept, that risks were not explained, that patients were not monitored, that equipment was not available, that anesthesia was misused. It

was the worst abortion clinic she had ever inspected. Of course, she rejected Gosnell's application. She just never told anyone in authority about all the horrible, dangerous things she had seen.

Bureaucratic inertia is not exactly news. We understand that. But we think this was something more. We think the reason no one acted is because the women in question were poor and of color, because the victims were infants without identities, and because the subject was the political football of abortion.

Names

Obviously, Kermit Gosnell is the man with the clearest criminal culpability for what happened here. But many of the people who worked for the Women's Medical Society should also be charged with criminal offenses; and many of the people who worked for the public, while not criminally liable, should be called out.

We group the criminal charges into three categories: charges arising from the baby murders and illegal abortions; charges in connection with the death of Karnamaya Mongar; and charges stemming generally from the ongoing operation of a criminal enterprise.

We were able to document seven specific incidents in which Gosnell or one of his employees severed the spine of a viable baby born alive. We charge Gosnell, Lynda Williams, Adrienne Moton, and Steven Massof with murder in the first degree. Along with Sherry West, they are also charged with conspiracy to commit murder in relation to the hundreds of unidentifiable instances in which they planned to, and no doubt did, carry out similar killings. We also charge Gosnell with various viola-

tions of the Abortion Control Act, including infanticide and performing illegal late-term abortions. Charged as co-conspirators with him in this regard are Williams, West, and Pearl Gosnell, his wife.

Two employees were Gosnell's accomplices in the administration of the drugs that killed Karnamaya Mongar. We charge Gosnell, Lynda Williams, and Sherry West with third-degree murder, drug delivery resulting in death, violations of the controlled substance act and conspiracy. Gosnell, West, and Elizabeth Hampton are charged with hindering apprehension (and Hampton also with perjury) for lying to the police, to the hospital, and to us about how this woman died.

Illegality was so integral to the operation of the Women's Medical Society that the business itself was a corrupt organization. We charge Gosnell, Lynda Williams, Sherry West, Adrienne Moton, Maddline Joe, Tina Baldwin, Pearl Gosnell, Steven Massof, and Eileen O'Neill with running that organization or conspiring to do so. We charge Massof and O'Neill, in conspiracy with Gosnell, with theft by deception for pretending to be doctors, and billing for their services as if they were licensed physicians. Gosnell should also be charged with obstruction and tampering for altering his patient files to hide illegality, and for destroying or removing other files entirely. As a final note, we charge Gosnell and Tina Baldwin, his employee, with corrupting the morals of a minor. Gosnell hired Tina's 15-year-old daughter as a staff member. She was required to work 50-hour weeks, starting after school until past midnight, during which she

was exposed to the full horrors of Gosnell's practice. Bad enough that he expected grown-ups to do it.

That leaves the government employees whose job was to make sure that things like this don't happen. Worth special mention is Janice Staloski of the Pennsylvania Department of Health, who personally participated in the 1992 site visit, but decided to let Gosnell slide on the violations that were already evident then. She eventually rose to become director of the division that was supposed to regulate abortion providers, but never looked at Gosnell despite specific complaints from lawyers, a doctor, and a medical examiner. After she was nonetheless promoted, her successor as division director, Cynthia Boyne, failed to order an investigation of the clinic even when Karnamaya Mongar died there. Senior legal counsel Kenneth Brody insisted that the department had no legal obligation to monitor abortion clinics, even though it exercised such a duty until the Ridge administration, and exercised it again as soon as Gosnell became big news. The agency's head lawyer, chief counsel Christine Dutton, defended the department's indifference: "People die," she said.

Lawyers at the Pennsylvania Department of State behaved in the same fashion. Attorneys Mark Greenwald, Charles Hartwell, David Grubb, Andrew Kramer, William Newport, Juan Ruiz, and Kerry Maloney were confronted with a growing pile of disquieting facts about Gosnell, including a detailed, inside account from a former employee, and a 22-year-old dead woman. Every time, though, they managed to dismiss the evidence as immaterial. Every time, that is, until the facts hit the fan.

We want better from our public servants. We trust that their actions will be reviewed, and that they will be held accountable.

What to do

If oversight agencies expect to prevent future Dr. Gosnells, they must find the fortitude to enact and enforce the necessary regulations. Rules must be more than words on paper.

We recommend that the Pennsylvania Department of Health plug the hole it has created for abortion clinics. They should be explicitly regulated as ambulatory surgical facilities, so that they are inspected annually and held to the same standards as all other outpatient procedure centers. Inspectors should review patient files, including ultrasound images, on site. Equipment, and employees' licenses, should be scrutinized. Second-trimester abortions should be performed or supervised by physicians board-certified in obstetrics and gynecology.

The Pennsylvania Department of State must repair its review process. Complaints should be taken by internet and telephone, and patients should be assured of confidentiality and a response when the investigation is completed. No complaint should be dismissed until the subject's full history of prior complaints has been considered, and malpractice databases have been examined. Reports about individual doctors should be cross-checked against reports about the medical offices where they have worked, and vice versa.

The Philadelphia Department of Public Health should do at least as much to control infectious medical

waste as it does to inspect swimming pools and beauty parlors.

Statutory changes are necessary as well. Infanticide and third-trimester abortion are serious crimes. The two-year statute of limitations currently applicable for these offenses is inadequate to their severity. The limitations period for late abortion should be extended to five years; infanticide, like homicide, should have none. Impersonating a physician is also a serious, and potentially very dangerous, act. Yet under current law it is not a crime at all. An appropriate criminal provision should be enacted. There may also be other statutory and regulatory revisions that we, as lay people, have not thought to consider. Legislative hearings may be appropriate to further examine these issues.

We recognize that these relatively technical recommendations will be unsatisfying to those fighting the abortion battle. "Pro-choice" advocates will argue that the real solution is government-funded abortion. "Pro-lifers" will see the case as an indictment of all legalized abortion.

We must leave these broader questions to others; our authority as a grand jury is more limited. But we exercise its full extent by recommending the maximum response available under the criminal law: murder charges. If you willfully disregard a deadly risk to the mother's life, and kill her, you will be charged with murder. If you deliver a viable baby, born alive, and kill it, you will be charged with murder. That prospect may make doctors more careful about performing abortions, especially abortions approaching the legal limit. We hope so.

Section II: The Raid

The search team waited outside until Gosnell finally arrived at the clinic, at about 8:30 p.m. When the team members entered the clinic, they were appalled, describing it to the Grand Jury as "filthy," "deplorable," "disgusting," "very unsanitary, very outdated, horrendous," and "by far, the worst" that these experienced investigators had ever encountered.

There was blood on the floor. A stench of urine filled the air. A flea-infested cat was wandering through the facility, and there were cat feces on the stairs. Semi-conscious women scheduled for abortions were moaning in the waiting room or the recovery room, where they sat on dirty recliners covered with blood-stained blankets.

All the women had been sedated by unlicensed staff – long before Gosnell arrived at the clinic – and staff members could not accurately state what medications or dosages they had administered to the waiting patients. Many of the medications in inventory were past their expiration dates.

Investigators found the clinic grossly unsuitable as a surgical facility. The two surgical procedure rooms were filthy and unsanitary – Agent Dougherty described them as resembling "a bad gas station restroom." Instruments were not sterile. Equipment was rusty and outdated. Oxygen equipment was covered with dust, and had not been inspected. The same corroded suction tubing used for abortions was the only tubing available for oral airways if assistance for breathing was needed. There was no functioning resuscitation or even monitoring equip-

ment, except for a single blood pressure cuff in the recovery room.

Ambulances were summoned to pick up the waiting patients, but (just as on the night Mrs. Mongar died three months earlier), no one, not even Gosnell, knew where the keys were to open the emergency exit. Emergency personnel had to use bolt cutters to remove the lock. They discovered they could not maneuver stretchers through the building's narrow hallways to reach the patients (just as emergency personnel had been obstructed from reaching Mrs. Mongar).

The search team discovered fetal remains haphazardly stored throughout the clinic – in bags, milk jugs, orange juice cartons, and even in cat-food containers. Some fetal remains were in a refrigerator, others were frozen. Gosnell admitted to Detective Wood that at least 10 to 20 percent of the fetuses were probably older than 24 weeks in gestation – even though Pennsylvania law prohibits abortions after 24 weeks. In some instances, surgical incisions had been made at the base of the fetal skulls.

The investigators found a row of jars containing just the severed feet of fetuses. In the basement, they discovered medical waste piled high. The intact 19-week fetus delivered by Mrs. Mongar three months earlier was in a freezer. In all, the remains of 45 fetuses were recovered at the clinic that evening and turned over to the Philadelphia medical examiner, who confirmed that at least two of them, and probably three, had been viable.

A simultaneous search of Gosnell's house found patient files that he had taken from the clinic. In a filing

cabinet in his 12-year-old daughter's closet, they found $240,000 in cash and a gun.

On February 22, 2010, the Pennsylvania Board of Medicine suspended Gosnell's medical license, citing "an immediate and clear danger to the public health and safety." On March 12, the state Department of Health filed papers to begin the process of shutting down the clinic.

The Philadelphia District Attorney submitted this case, pertaining to criminal wrongdoing at Gosnell's clinic, to the Grand Jury on May 4, 2010. We, the jurors, have reviewed thousands of pieces of evidence and heard testimony from 58 witnesses. The squalid spectacle that greeted investigators when they raided the clinic last February was awful, to say the least. Yet even their descriptions of the scene could not prepare the Grand Jurors for the shocking things we have since learned about Gosnell, his medical practice, and the way abortion clinics are regulated in Pennsylvania.

Section III: Gosnell's Illegal Practice

The Deaths Of Women And Of Countless Viable Babies Were A Direct And Foreseeable Consequence Of The Reckless And Illegal Manner In Which Gosnell Operated His Clinic.

Mrs. Mongar was just one of many patients victimized by Gosnell's depravity. There were scores more. At least one other mother died following an abortion in which Gosnell punctured her uterus and then sent her

home. He left an arm and a leg of a partially aborted fetus in the womb of another woman, and then told her he did not need to see her when she became sick days later, having developed a temperature of 106 degrees. He perforated bowels, cervixes, and uteruses. He left women sterile.

He also killed live, viable, moving, breathing, crying babies. He killed them by cutting their spinal cords after their mothers had delivered them after receiving excessive amounts of medication designed to induce active labor. This report documents multiple murders of viable babies. The evidence makes a compelling case that many others were also murdered.

Gosnell and his employees performed abortions long after the legal limit. The doctor's unorthodox methods, especially with late second-trimester and third-trimester pregnancies, virtually mandated the premature delivery of live babies – whose spinal cords he would then routinely slit. These practices persisted for many years without interruption by any regulatory body.

The pain, suffering, and death that he and his employees perpetrated were not the result of accidentally botched procedures. It was Gosnell's standard business practice, to slay viable babies. The women who died, or whose health he recklessly endangered or irreparably harmed, were simply collateral damage for the doctor's corrupt and criminal enterprise.

Gosnell set up his practice so that, in his absence, excessively medicated patients went into labor and often delivered live babies.

Very often, the patient delivered without Gosnell being present. Lewis testified that one or two babies fell out of patients each night. They dropped out on lounge chairs, on the floor, and often in the toilet. If the doctor was not there, it was not unusual for no one to tend to the mother or the baby. In fact, several of the clinic's workers refused to deal with the expelled babies or the placenta. So, after delivering babies, women and girls would have to just sit and wait – sometimes on a toilet for hours – for Gosnell to arrive. Lewis acknowledged that she would not do anything but wait with the women:

> A lot of times this happened when [Gosnell] wasn't there. If a baby was about to come out, I would take the woman to the bathroom, they would sit on the toilet and basically the baby would fall out and it would be in the toilet and I would be rubbing her back and trying to calm her down for two, three, four hours until Dr. Gosnell comes. She would not move.

James Johnson, who supposedly cleaned the clinic and bagged its infectious waste, confirmed Lewis's account. He testified that sometimes patients "miscarried or whatever it was" into the toilet and clogged it. He described how he had to lift the toilet so that someone else – he said it was too disgusting for him – could get the fetuses out of the pipes.

Amazingly, these premature deliveries – what Gosnell called "precipitations" – were routine. The doctor's customary practice called for intense and painful labor, accompanied by heavy doses of potent drugs, all while he was absent from the clinic. Lewis said Gosnell told her

that he preferred it when women precipitated, often before he got to the clinic, because it made his job easier. A surgical procedure to remove fetuses, Lewis explained, could take half an hour. Whereas there was little to do – just suctioning the placenta – when babies were already expelled. In addition, by avoiding surgical abortions, Gosnell was less likely to perforate the women's uteruses with surgical instruments – something he had done, and been sued for, many times.

If fetuses had not precipitated, Gosnell would often have his staff physically push them out of their mothers by pressing on the mothers' abdomens.

According to a board-certified gynecologist and obstetrician who testified as a medical expert, Gosnell's labor-induction method of performing second-trimester abortions – as opposed to a standard surgical procedure – entails significant risks, including hemorrhage and debilitating pain that leaves patients unable to care for themselves. The pain suffered by women in full labor requires careful supervision and appropriate sedation. Thus, according to the expert, labor induction should be performed only in a hospital setting, where medical professionals can monitor the women throughout their labor. Gosnell had neither the staff nor the facility to perform this type of abortion safely. He did it routinely anyway.

Gosnell staffed his abortion clinic with unlicensed and unqualified workers.

Gosnell deliberately hired unqualified staff because he could pay them low wages, often in cash. Most of Gosnell's employees who worked with patients had little or

no remotely relevant training or education. Nor did they have any certifications or licenses to treat patients. Yet they did so regularly, and without supervision – in violation of Pennsylvania's medical practice standards and the law.

Kermit Gosnell himself was not qualified. Under Pennsylvania law, an abortion facility must have at least one doctor certified by the American Board of Obstetrics and Gynecology, either on staff or as a consultant. Gosnell, the only licensed physician associated with the Womens' Medical Society, is not an obstetrician or gynecologist, much less a board-certified one. In fact, 40 years ago, he started but failed to complete a residency in obstetrics and gynecology.

Gosnell routinely cracked jokes about babies whose necks he had just slit. He treated his patients with condescension – slapping them, providing abysmal care, and often refusing even to see or talk to them – unless they were Caucasian, or had money. He yelled at and intimidated his staff. And he took advantage of poor women in desperate situations.

The Women's Medical Society Was Filthy And Totally Unsuitable As A Medical Office Or A Surgical Facility.

The Grand Jury toured the facility at 3801 Lancaster Avenue. It is unbelievable to us that the Pennsylvania Department of Health approved this building as an abortion facility. We were stunned to learn that, between

1978 and 1993, the department sporadically inspected and approved the clinic, and then never inspected it again until February 2010, when health department employees entered the facility at the request of law enforcement officials who were investigating allegations of the illegal sale of drugs and prescriptions.

The physical layout of the clinic, a confusing maze of narrow hallways and multiple twisting stairways, should have been an obvious bar to its use for surgical procedures. The three-story structure, created by joining two buildings, had no elevator. Access from procedure rooms to the outside by wheelchair or stretcher was impossible, as was evident the night Karnamaya Mongar died.

According to former staff members, the facility had been substantially cleaned up by the time the Grand Jury visited it. Between late February 2010, when the practice was closed, and our tour of the clinic in August, significant efforts had been made to make the facility look and smell cleaner. Despite such efforts, it remained a wretched, filthy space. The walls appeared to be urine-splattered. The procedure tables were old and one had a ripped plastic cover. Suction tubing, which was used for abortion procedures – and doubled as the only available suction source for resuscitation – was corroded. A large, dirty fish tank stood in the waiting room, filled with turtles and fish. The dirt-floored basement was stuffed with patient files, plants, junk, and boxes of un-disposed-of medical waste. The entire facility smelled foul.

These were the conditions after the facility had been shut down and cleaned. Former employees, including Latosha Lewis and Kareema Cross, testified to the ab-

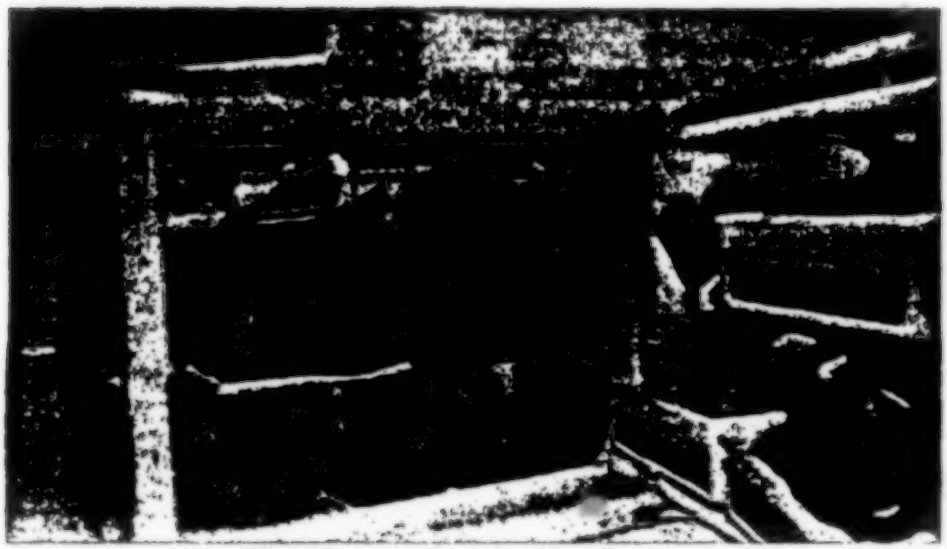
horrent conditions when the clinic was operating. They described the odor that struck one immediately upon entering – a mix of smells emanating from the cloudy fish tank where the turtles were fed crushed clams and baby formula; and from boxes of medical waste that sat around for weeks at a time, leaking blood, whenever Gosnell failed to pay the bill to the disposal company.

They described blood-splattered floors, and blood-stained chairs in which patients waited for and then recovered from abortions. Even the stirrups on the procedure table were often caked with dried blood that was not cleaned off between procedures. There were cat feces and hair throughout the facility, including in the two procedure rooms. Gosnell, they said, kept two cats at the facility (until one died) and let them roam freely. The cats not only defecated everywhere, they were infested with fleas. They slept on beds in the facility when patients were not using them.

Kareema Cross testified about the procedure rooms: "The rooms were dirty. Blood everywhere. Dust everywhere. Nothing was clean." The bathrooms, according to Lewis, were cleaned just once a week despite the fact that patients were vomiting in the sinks and delivering babies in the toilets.

Large procedure room, showing soiled table

Medical waste and fetal remains were supposed to be picked up weekly by a licensed disposal provider. Gosnell, however, did not pay his bills in a timely manner, and the disposal provider would not pick up – sometimes for months. In the interim, and as the search team discovered during the February 18 raid, freezers at the clinic were full of discarded fetuses, and medical waste was piled up in the basement.



Fetal remains in the freezer

Sometimes, according to Tina Baldwin, fetal remains were left out overnight. "You knew about it the next day when you opened the door Because you could smell it as soon as you opened the door." According to a plan that Gosnell filed with the Philadelphia Health Department in 2004, waste was to be stored in the basement for once-a-week pickup by a waste disposal company. But he didn't follow the plan. He failed to pay his bills. Weeks went by without a pickup, and the containers in the basement leaked.

Bags of biohazardous material in basement

Gosnell Used And Reused Unsanitary Instruments To Perform Abortions.

The instruments that were inserted into women's bodies were also unsanitary, according to the workers. Kareema Cross showed the Grand Jury a photograph she had taken, showing how the instruments were purportedly sterilized. The photo shows a pan on the floor. In it are the doctor's tools, supposedly soaking in a sterilizing solution. But the photo shows that the instruments cannot get clean because they do not fit in the pan, and are not submerged. Gosnell would nonetheless pluck instruments from this pan on the floor and use them for procedures. Cross said that she saw Gosnell insert into a woman's vagina a speculum that was still bloody from a previous patient. She testified about how Gosnell would ignore her complaints about his unsanitary practices:

> The instruments were dirty. It was plenty of times that I had complained. He'll – it would be a spec, a speculum and he'll use it. I would complain – I'll leave the speculum on his tray, so he can see it. So he can say something to whoever is cleaning them. It'll have blood on it. And he would still use it and it was a lot of girls that was complaining about getting infections
>
> trichonomas, chlamydia because of the instruments not being cleaned.

Several workers testified that Gosnell insisted on reusing plastic curettes, the tool used to remove tissue from the uteruses, even though these were made for single use only. Latosha Lewis testified that Gosnell would make his staff reuse the curettes until they broke. Like Cross, Lewis believed it was the unsanitary instruments that were causing patients to become infected with chlamydia and gonorrhea.

When inspectors from Pennsylvania's Departments of Health and State surveyed the facility in February 2010, they corroborated much of what the former staff members described. Department of Health workers found that the suction source used by the doctor to perform abortions was the only one available to resuscitate patients. They found the tubing attached to the suction source was "corroded." They also described the suction source's vacuum meter as "covered with a brown substance making the numbers on the meter barely readable." An oxygen mask and its tubing were "covered in a thick gray layer of a substance that appeared to be dust."

Procedure room, depicting ripped procedure table & stirrup, dust-covered oxygen tank, corroded tubing,

The inspector from the Department of State reported: "The clinic conditions are deplorable and unsanitary ... There was blood on the floor and parts of aborted fetuses were displayed in jars."

Gosnell had unlicensed and unsupervised staff routinely administer potent and dangerous drugs when he was not present at the clinic.

As bad as the physical condition of the facility was, the practice that Gosnell conducted inside of it was even worse. It was not a mistake or an exceptional circumstance that forced Lynda Williams and Sherry West to sedate Mrs. Mongar when Gosnell was absent from his clinic. According to multiple staff members, that was routine procedure. In fact, Gosnell, the clinic's only li-

censed medical provider, rarely arrived at all before 8:00 p.m. Abortion patients, on the other hand, began arriving as early as noon. It was Gosnell's intention and instruction that his untrained and unlicensed staff administer drugs – both to initiate labor and to sedate patients – before he arrived.

Patients, meanwhile, did not receive individual medical consideration. Drugs were administered without regard to a patient's weight, medical condition, potential risk factors, or any other relevant factors that physicians need to weigh in determining appropriate medication. Gosnell ordered his untrained and inexperienced staff to administer drugs to patients even when they protested, as 16-year-old Ashley Baldwin did, that they were not qualified. Gosnell told Ashley and other employees that if they were not willing to administer medication and anesthetize patients, procedures that Pennsylvania law requires a medical license to perform, they could not work at the clinic.

As Kareema Cross explained it, Gosnell told her when she was first hired that it was her job to medicate the patients when they were in pain. But after assigning this as one of her job responsibilities, he did not oversee what she did on individual patients. Indeed, he couldn't oversee his workers as they anesthetized patients, because he was usually not at the clinic when they did so. His practice was to leave it to the untrained workers to decide when to medicate and re-medicate the patients. He also left the precise medication mixture to the judgment of his unlicensed, untrained staff.

Gosnell disliked it when workers disturbed him by calling for medication advice. Ashley told us that he complained that they were "rushing him." According to Lewis, "You had to rely on your own. If you felt like they were in pain and you wanted to administer medication, you would just administer the medication yourself."

Williams was known by other staff members to improvise her own drug cocktails. She would give a patient "[w]hat she thought she needed," according to Ashley. "She used what she wanted." West would do the same. Other staff members repeatedly reported this dangerous practice to Gosnell, yet he continued to give Williams responsibility for drugging his second-trimester patients. Cross warned Gosnell in 2008 that Williams gave too much medication, but "Gosnell didn't care what she did." Cross would tell Williams that she was giving too much medication; Williams would respond, "well, that is what Dr. Gosnell told me to give."

Gosnell's practice of having unqualified personnel administer anesthesia began years before the death of Mrs. Mongar. We heard from a former employee, Marcella Stanley Choung, who told us that her "training" for anesthesia consisted of a 15-minute description by Gosnell and reading a chart he had posted in a cabinet. She was so uncomfortable medicating patients, she said, that she "didn't sleep at night." She knew that if she made even a small error, "I can kill this lady, and I'm not jail material." One night in 2002, when she found herself alone with 15 patients, she refused Gosnell's directives to medicate them. She made an excuse, went to her car, and drove away, never to return.

Choung immediately filed a complaint with the Department of State, but the department never acted on it. She later told Sherilyn Gillespie, a Department of State investigator who participated in the February raid, that she has worked at seven different abortion clinics and "she has never experienced an illegally run, unsanitary, and unethical facility such as the Women's Medical Society operated by Dr. Gosnell." She has never reported any other provider or facility to state authorities.

Gosnell knew that using unlicensed and uncertified staff was wrong. He had testified in the criminal trial of a man charged with illegally practicing medicine by assisting Gosnell with abortion procedures in 1972. In 1996, he was censured and fined in two states – Pennsylvania and New York – for employing unlicensed personnel in violation of laws regulating the practice of medicine. As far back as 1989, and again in 1993, the Pennsylvania Department of Health cited him for not having any nurses in the recovery room. Gosnell ignored the warnings and the law. He just paid his fines and knowingly continued the dangerous practice of employing unqualified personnel to administer dangerous drugs. It was his modus operandi.

When something went wrong, Gosnell avoided seeking emergency assistance for patients.

If something went wrong during a procedure – and it inevitably did, given Gosnell's careless techniques and gross disregard for patient safety – he avoided seeking help. Sherilyn Gillespie, the Department of State investigator who participated in the raid, interviewed a num-

ber of former patients whose experiences illustrate Gosnell's alarming and self-serving practice of covering up life-threatening mistakes, no matter the risk to the patient.

Dana Haynes went to Gosnell for an abortion in November 2006. She called relatives just before her procedure to tell them that she should be ready to be picked up by 7:45 p.m. When Ms. Haynes's cousins arrived, clinic staff refused to admit them into the clinic and made excuses as to why Haynes was not ready. Finally, after hours of waiting, the cousins gained entry to the clinic by threatening to call the police. They found Ms. Haynes alone, incoherent, slumped over, and bleeding. There was no monitoring equipment, and there was blood on the floor.

Gosnell called an ambulance only after the cousins demanded that he do so. Kareema Cross testified that, after having problems performing Ms. Haynes's abortion and extracting only portions of her fetus, Gosnell had placed her in the recovery room while he performed abortions on other patients. Rather than call an ambulance, Gosnell kept Ms. Haynes waiting for hours after the unsuccessful procedure because he wanted to try to fix it himself. By the time Ms. Haynes's cousins rescued her from the recovery room, Gosnell had tried at least twice, unsuccessfully, to complete the abortion.

Ms. Haynes was transported to the Hospital of the University of Pennsylvania. There, doctors discovered that Gosnell had left most of the fetus inside her uterus and had perforated her cervix and bowel. Ms. Haynes required surgery to remove five inches of bowel, needed

a large blood transfusion, and remained hospitalized for five days.

Similarly, Gosnell should have sent another patient, Marie Smith, to the hospital when he was unable to remove the entire fetus during her abortion in November 1999. But again, he just kept the patient waiting, sedated and bleeding in the recovery room while he proceeded with other patients. Again, it was an insistent relative – Marie's mother – who found her. In Marie Smith's case, Gosnell did not tell her that he had left parts of the fetus inside her uterus. (Doctors are required to inspect the extracted tissue to ensure they have removed it all.)

Instead, Gosnell allowed Marie Smith to go home. When her mother called days later to report that Marie's condition had worsened, he assured her that Marie would be fine. Fortunately, the mother ignored Gosnell's assurances and took her daughter to the emergency room. When they arrived at Presbyterian Hospital, Marie was unconscious. Doctors found that Gosnell had left fetal parts inside her and that she had a severe infection. They told her she was lucky to be alive.

Another patient, a 19-year-old, had to have a hysterectomy after Gosnell left her sitting in his recovery room for over four hours after perforating her uterus. Gosnell finished performing the abortion at 8:45 p.m. on April 16, 1996, but did not call fire rescue until 1:15 a.m. By the time emergency help arrived, the patient was not breathing. She arrived at the Hospital of the University of Pennsylvania in shock, having lost significant blood. To save her life, doctors had to remove her uterus.

In at least one case, Gosnell prevented a patient's companion from summoning help. The patient, a recovering addict who was undergoing methadone treatment, started convulsing when Gosnell administered anesthesia. When she fell off the procedure table and hit her head, the staff summoned her companion who was waiting for her. The companion asked Gosnell to call an ambulance, but Gosnell refused. He also prevented the companion from leaving the clinic to summon help.

Tina Baldwin told us that she knew of two or three times that Gosnell perforated a woman's uterus and then tried to surgically repair these mistakes himself. According to Tina Baldwin, Gosnell did not even tell these patients that he had harmed them.

Gosnell took photographs of his patients' genitalia before procedures and collected fetuses' feet in jars.

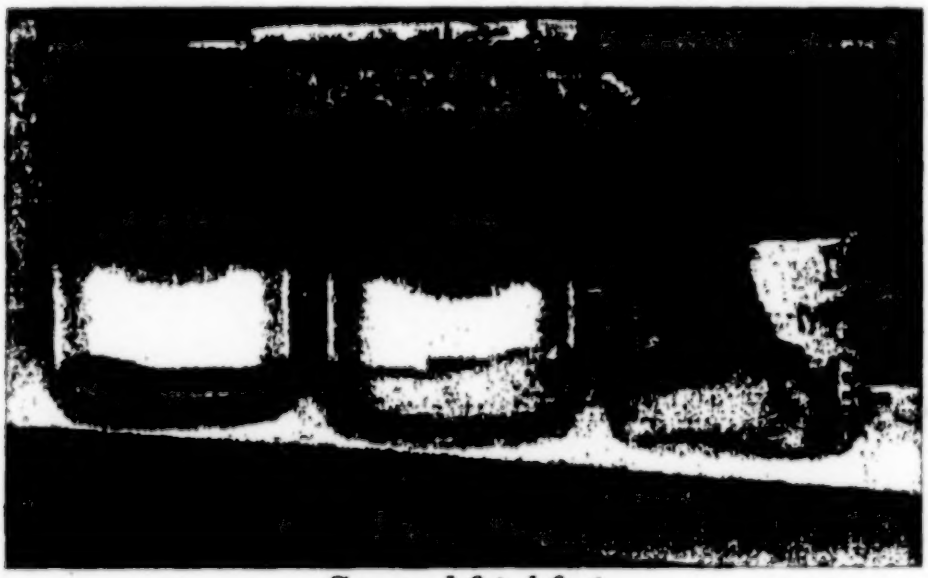
Gosnell engaged in other practices with patients that defy any medical or even common-sense explanation. Steven Massof testified that the doctor would often photograph women's genitalia before he performed their abortions. According to Massof, Gosnell told him that he was photographing women from Liberia and other African countries who had undergone clitorodectomies, the surgical removal of the clitoris.

In his curriculum vitae, Gosnell described this activity as "clinical research: clitoral surgery patients – cultural and functional realities." There is no evidence, however, that the doctor obtained the necessary permissions to engage in human experimentation.

Massof said that Gosnell took pictures of women, and of fetuses, with a digital camera and with his phone.

Gosnell told Massof that he was taking the photographs for "his teaching," but Massof said that he was unaware that Gosnell taught anywhere. Gosnell would often show the photographs to Massof and exclaim about the skill of the surgeons who had sewn the women's labia together, leaving only a small opening to allow menstrual flow.

Another of the doctor's practices that defies explanation was his habit of cutting the feet off of aborted fetuses and saving them in specimen jars in the clinic. Kareema Cross showed the Grand Jury photographs she had taken in 2008 of a closet where Gosnell stored jars containing severed feet. During the February 2010 raid, investigators were shocked to see a row of jars on a clinic shelf containing fetal parts. Ashley Baldwin testified that she saw about 30 such jars.



Severed fetal feet

None of the medical experts who testified before the Grand Jury had ever heard of such a disturbing practice, nor could they come up with an explanation for it. The medical expert on abortions testified that cutting off the feet "is bizarre and off the wall." The experts uniformly rejected out of hand Gosnell's supposed explanation that he was preserving the feet for DNA purposes should paternity ever become an issue. A small tissue sample would suffice to collect DNA. None of the staff knew of any instance in which fetal feet were ever used for this purpose.

Gosnell operated his clinic with complete disregard for pennsylvania laws that regulate abortion clinics, health care facilities, and the practice of medicine.

Gosnell flagrantly violated virtually every regulation and law Pennsylvania has relating to the operation of abortion facilities. He did not comply with the basic standards of his profession. Nor did he follow state regulations pertaining to health care facilities generally.

Gosnell violated Pennsylvania's Abortion Control Act in many ways. He failed to counsel patients, despite a requirement to provide counseling at least 24 hours before abortions. He performed abortions on minors without a parent's consent or a court order. He failed to take steps to ascertain accurate gestational ages and he intentionally falsified gestational ages. He did not report to the state Department of Health any of the second- and third-trimester abortions that he performed. Nor did he comply with the Act's requirement to send tissue from late-term abortions to a pathologist to verify that fetuses were not viable or born alive.

Many of Gosnell's violations directly endangered women and caused them serious harm. His contempt for laws designed to protect patients' safety resulted in the death of Karnamaya Mongar. For example, although Pennsylvania's abortion regulations, 28 Pa. Code §29.31 et seq., require abortion providers to have functional resuscitation equipment and drugs "ready for use," Gosnell had no such provisions. The clinic's one defibrillator, the device used to help revive cardiac arrest patients, had not worked for years. There was only one suction source – the one Gosnell used for the abortion procedures – and no equipment to assist with breathing. And on February 18, 2010, three months after Karnamaya Mongar had died of an overdose of anesthesia, there was no "crash cart" with the drugs necessary to reverse the effects of just such overdoses. Had any of these items been present in the clinic, as the law requires, Mrs. Mongar might be alive.

Gosnell's facility also lacked equipment legally mandated for monitoring sedated patients. According to Kareema Cross, the clinic owned one old electrocardiogram (EKG) machine to monitor heart rate and a pulse oximeter, an instrument that is attached to the patient's finger and measures oxygen saturation in the blood, but these had not worked for at least six years. These instruments are the minimum equipment required to monitor patients who are sedated, according to the certified gynecologist and obstetrician who shared his expertise with the Grand Jury. The Department of Health found only one blood pressure cuff in the clinic in February 2010.

Gosnell's failure to equip his clinic with functioning monitoring and resuscitation instruments was all the more dangerous because of his use of unlicensed workers to perform crucial jobs. State abortion regulations require that women in the recovery room be "supervised constantly" by a registered nurse or a licensed practical nurse under the direction of a registered nurse or a physician. From 2006 until the clinic closed in 2010, Gosnell's recovery room was often supervised – and not constantly, because she had several other duties – by a high school student, Ashley Baldwin. The state Department of Health documents that, as far back as 1989, Gosnell had no registered or licensed nurses to staff the clinic's recovery room.

The complete disregard for patient care was evident in every aspect of Gosnell's practice. The staff routinely discharged patients before they were fully alert or could even walk. Tina Baldwin described how staff members would discharge still-medicated patients when closing time came:

> A: Oh, I did see some people, they were so drugged. I mean you had to get them out, take them with a wheel chair – take them out in a wheelchair.
>
> Q: And you would just send them on their merry way out the door?
>
> A: If it got late, at the time when I was working there, if it got too late like 1:00, 2:00 in the morning and they had a family member, yeah they would go out.

The state law requires that a second doctor, or a nurse anesthetist, administer general anesthesia, if it is used. General anesthesia is defined by anesthesiologists as a drug-induced loss of consciousness during which patients cannot be aroused, even by painful stimulation, a definition that would include the clinic's "custom sleep" dosage administered to "knock [patients] out." Not only did the clinic not have a second doctor administer anesthesia, it did not have any doctor at all present when Ashley Baldwin, Lynda Williams, Sherry West, Tina Baldwin, Latosha Lewis, Kareema Cross, Adrienne Moton, and Steve Massof routinely administered mixtures of potentially lethal drugs to clinic patients.

Another violation of Pennsylvania law proved significant the night Karnamaya Mongar died: Clinics must have doors, elevators, and other passages adequate to allow stretcher-borne patients to be carried to a street-level exit. Gosnell's clinic, with its narrow, twisted passageways, could not accommodate a stretcher at all. And his emergency street-level access was bolted with no accessible key. Any chance Mongar had of being revived was hampered by the time wasted looking for keys to the door. Ashley Baldwin testified:

> Q: How long was – were the paramedics on-site?
> A: A long time, because I couldn't get the key to the lock.
>
> Q: What happened? Tell the members of the jury what happened.

A: Doc told me to get the keys to the locks, but it was like six sets of locks with thirty keys on each one.

Section IV: The Intentional Killing Of Viable Babies

Gosnell left dozens of damaged women in his wake. His reckless treatment left them infected, sterilized, permanently maimed, close to death, and, in at least two cases, dead. Their injuries and deaths resulted directly from Gosnell's utter disregard for their health and safety. However, if their fate was entirely foreseeable, it was not necessarily the product of specific intent to kill. The same cannot be said of untold numbers of babies – not fetuses in the womb, but live babies, born outside their mothers – whose brief lives ended in Gosnell's filthy facility. The doctor, or his employees acting at his direction, deliberately killed them as part of the normal course of business.

Gosnell and his staff severed the spinal cords of viable, moving, breathing babies who were born alive.

Surgical abortions in Pennsylvania, performed up to 24 weeks of gestational age, are legal. Killing living babies outside the womb is not. The neonatologist who testified before the Grand Jury defined "born alive." According to this expert witness, the federal Born-Alive Infants Protection Act defines a human as "somebody who's been completely expelled from the mother and has

either a heartbeat, pulsating cord, or is moving." Pennsylvania's Abortion Control Act defines "born alive" similarly, but adds breathing and brain wave activity as indicators of life. 18 Pa.C.S. §3203.

Gosnell's staff testified about scores of gruesome killings of such born-alive infants carried out mainly by Gosnell, but also by employees Steve Massof, Lynda Williams, and Adrienne Moton. These killings became so routine that no one could put an exact number on them. They were considered "standard procedure." Yet some of the slaughtered were so fully formed, so much like babies that should be dressed and taken home, that even clinic employees who were accustomed to the practice were shocked.

Baby Boy A

One such baby was a boy born in July 2008 to 17-year-old we will call "Sue." Sue first met Gosnell at the Atlantic Women's Medical Services, an abortion clinic in Wilmington, Delaware, where Gosnell worked one day a week. The girl was accompanied by her great aunt, who had agreed to pay for the procedure, and who testified before the Grand Jury.

After an ultrasound was performed on Sue, Gosnell told the aunt that the girl's pregnancy was further along than she had originally told him, and that, therefore, the procedure would cost more than the $1,500 that had been agreed upon; it would now cost $2,500. (Gosnell normally charged $1,625 for 23-24 week abortions.) The aunt paid Gosnell in cash at the Delaware clinic. He inserted laminaria, gave Sue pills to begin labor, and instructed her to

be at the Women's Medical Center in Philadelphia at 9:00 the next morning.

Sue arrived with her aunt at 9:00 a.m. and did not leave the clinic until almost 11:00 that night. An ultrasound conducted by Kareema Cross recorded a gestational age of 29.4 weeks. Cross testified that the girl appeared to be seven or eight months pregnant. Cross said that, during 13-plus hours, the girl was given a large amount of Cytotec to induce labor and delivery. Sue complained of pain and was heavily sedated. According to Cross, the girl was left to labor for hours and hours. Eventually, she gave birth to a large baby boy. Cross estimated that the baby was 18 to 19 inches long. She said he was nearly the size of her own six pound, six ounce, newborn daughter.

After the baby was expelled, Cross noticed that he was breathing, though not for long. After about 10 to 20 seconds, while the mother was asleep, "the doctor just slit the neck," said Cross. Gosnell put the boy's body in a shoebox. Cross described the baby as so big that his feet and arms hung out over the sides of the container. Cross said that she saw the baby move after his neck was cut, and after the doctor placed it in the shoebox. Gosnell told her, "it's the baby's reflexes. It's not really moving."

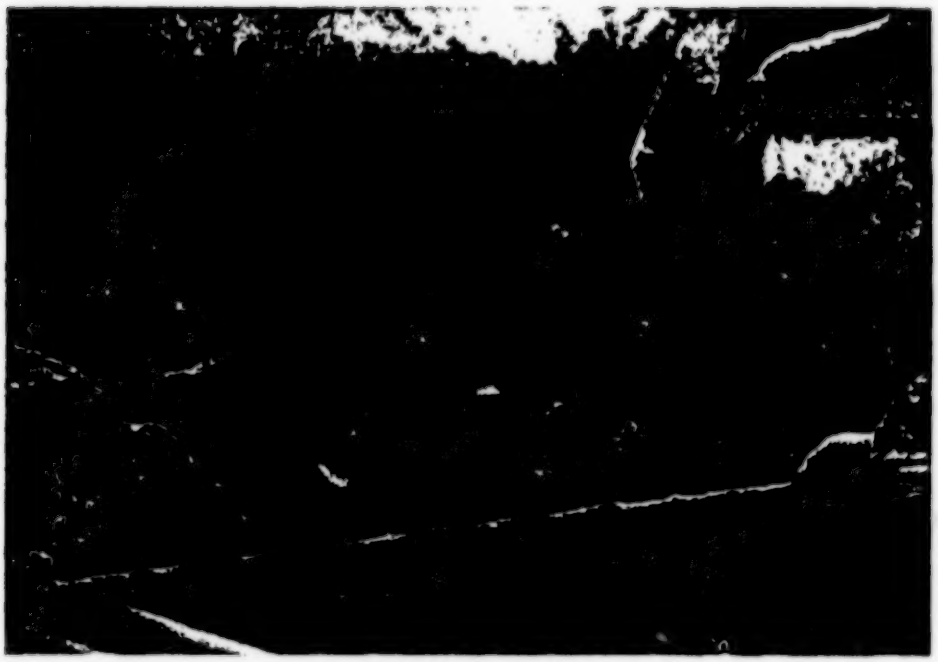
The neonatologist testified that what Gosnell told his people was absolutely false. If a baby moves, it is alive. Equally troubling, it feels a "tremendous amount of pain" when its spinal cord is severed. So, the fact that Baby Boy A. continued to move after his spinal cord was cut with scissors means that he did not die instantly.

Maybe the cord was not completely severed. In any case, his few moments of life were spent in excruciating pain.

Cross was not the only one startled by the size and maturity of Baby Boy A. Aurienne Moton and Ashley Baldwin, along with Cross, took photographs because they knew this was a baby that could and should have lived. Cross explained:

> Q. Why did you all take a photograph of this baby?
>
> A. Because it was big and it was wrong and we knew it. We knew something was wrong.
>
> ***
>
> I'm not sure who took the picture first, but when we seen this baby, it was – it was a shock to us because I never seen a baby that big that he had done. So it was – I knew something was wrong because everything, like you can see everything, the hair, eyes, everything. And I never seen for any other procedure that he did, I never seen any like that.

The neonatologist viewed a photograph of Baby Boy A. Based on the baby's size, hairline, muscle mass, subcutaneous tissue, well-developed scrotum, and other characteristics, the doctor opined that the boy was at least 32 weeks, if not more, in gestational age.



Baby Boy A

Gosnell simply noted the baby boy's size by joking, as he often did after delivering a large baby. According to Cross, the doctor said: "This baby is big enough to walk around with me or walk me to the bus stop."

The doctor released Sue to go home 13 or14 hours after she arrived. Her aunt described her condition: "She was moaning. She was standing up. She was like holding her stomach, doubled over." She remained in pain for days and could barely eat. When she developed a fever, her aunt called Gosnell. He instructed the aunt to take her temperature and asked if she was taking pain medicine he had given her – which she was. But he did not have her come in to be checked out. And he did not suggest that she go to a hospital. When Sue started throwing up a few days later, her grandmother contacted a dif-

ferent doctor, who told her to get to a hospital right away.

Sue was admitted to Crozier-Chester Hospital. Doctors there found that she had a severe infection and blood clots that had travelled to her lungs. According to Kareema Cross, who spoke to the aunt, Sue almost died. The teen stayed at the hospital for a week and a half. She became extremely thin and took months to recover, according to her aunt.

Other babies killed by Gosnell and his staff

Baby Boy A was among the more memorable large babies that Gosnell killed, perhaps because of the photographs, or because his teenage mother almost died too. He was not, however, the only one. Ashley Baldwin remembered Gosnell severing the neck of a baby that cried after being born. The baby had "precipitated" when the doctor was not in the clinic. Lynda Williams placed the baby in a basin on the counter where the instruments were washed and called the doctor to come.

Ashley heard the infant cry. She saw the baby move while it was on the counter. She estimated the infant was at least 12 inches long. When Gosnell arrived at the clinic, she recalled, "he snipped the neck, and said there is nothing to worry about, and he suctioned it."

If Gosnell was absent, his employees would kill viable babies. Ashley Baldwin saw Steve Massof slit the necks of babies that moved or breathed "five or ten" times. Massof, repeating what he had been taught by Gosnell, told her that that it was standard procedure to cut the spine in all cases. Ashley testified:

Q. These larger babies, when Dr. Steve was there, did he ever – was he ever there when any of the larger babies precipitated?

A. Yes.

Q. Babies that would move?

A. Yes.

Q. So, Dr. Steve – what would Dr. Steve do with babies that moved?

A. The same thing.

Q. The same thing. And how many time did you see Dr. Steve?

A. A lot. He told me that – don't worry about it. They are not living. It is just a reaction.

Kareema Cross testified that, between 2005 and 2008, she saw Steve Massof sever the spinal cords of at least ten babies who were breathing and about five that were moving.

When Massof left the clinic in 2008, Lynda Williams took over the job of cutting baby's necks when Gosnell was not there. Cross saw Williams slit the neck of a baby ("Baby C") who had been moving and breathing for approximately *twenty minutes*. Gosnell had delivered the baby and put it on a counter while he suctioned the placenta from the mother. Williams called Cross over to look at the baby because it was breathing and moving its arms when Williams pulled on them. After playing with the baby, Williams slit its neck.

When asked why Williams had killed the baby, Cross answered:

> Because the baby, I guess, because the baby was moving and breathing. And she see Dr. Gosnell do it so many times, I guess she felt, you know, she can do it. It's okay.

Adrienne Moton also killed at least one baby by cutting its spinal cord. Cross testified that a woman had delivered a large baby into the toilet before Gosnell arrived at work for the night. Cross said that the baby was moving and looked like it was swimming. Moton reached into the toilet, got the baby out and cut its neck. Cross said the baby was between 10 and 15 inches long and had a head the size of a "big pancake." Gosnell later measured one of the baby's feet and said that it was 24.5 weeks.

Gosnell's illegal and unorthodox practices resulted in the birth and then killing of many viable, live babies.

Killing really had to be part of Gosnell's plan. His method for performing late- term abortions was to induce labor and delivery of intact fetuses, and he specialized in patients who were well beyond 24 weeks. Thus, the birth of live, viable babies was a natural and predictable consequence. The subsequent slitting of spinal cords, without any consideration for the babies' viability, was an integral part of what Gosnell's employees called his "standard procedure."

Steve Massof described this "standard procedure." It required the clinic's unequipped staff to manage a clinic full of sedated patients who were thrown into full labor, and then to "deal" with whatever precipitated, including

live babies – all while the doctor was at home, or jogging, or working at a clinic in Wilmington. In particular, Massof described what Gosnell expected him to do when babies precipitated in the afternoon and evening before the doctor arrived:

> A: As I mentioned earlier, Dr. Gosnell would dilate the cervix to make room for passage of the products. And with the Cytotec, softening the cervix, the outlet of the uterus, well, mother nature would take its course. Every woman is different.
>
> Q: What would happen?
>
> A: Well, the fetus would precipitate.
>
> Q: What do you mean?
>
> A: Oh, come right out, right out. Just you know, I would be called, somebody would call me and at that point what I would have to do is, I'd have to go and tend to that patient.
>
> Q: How would you do that? What would you do?
>
> A: As – well, my first – my first reaction would be is at that point it depended sometimes it happened in the waiting room, sometimes it happened in the bathroom because, you know, a woman would be pushing in the bathroom. Sometimes, you know, it happened everywhere in the clinic.

So what I would do is, I'd make sure that when – if the fetus precipitated, the cord was cut. Also, a standard procedure, the cervical spine was cut, as well as make sure that there wasn't bleeding or, in other words, the placenta came down and that's the way – we insured less blood would be lost.

Q: How often did this happen?

A: More times than I really care to remember. I would have to say every week it would happen to at least 50 percent of the patients.

Q: Fifty percent of the time?

A: Yeah, easy, easy. That – you know, and that is how, you know, and that's what would happen.

Q: You said it was standard procedure to cut the – first to cut the umbilical cord?

A: Yes.

Q: That's from the mother or how is that attached?

A: Well that is from the mother to the fetus.

Q: And where would it be? Would it still be – the placenta would still be in the mother's uterus?

A: Yes. Q: Okay.

A: Yes. And so I would cut the attachment and you know, then the cervical portion of the spine at that point. Those were the larger patients.

Q: So you said that was standard procedure. What do you mean when you say standard procedure?

A: Well, that's – that was his standard procedure. Q: When you say his, do you mean Gosnell?
A: Yes.

Q: Did he show you how to do that?

A: Yes, he did.

Q: When did he show you how to do that?

A: He showed me how to do that maybe 2004, sometime within a year I started working there, that is what he did during his [second-trimester] procedures.

Tina Baldwin corroborated that this was Gosnell's standard procedure. She explained that after a fetus was expelled, Gosnell "used to go ahead and do the suction in the back of the neck." She saw this "hundreds" of times. Gosnell told her that this was "part of the demise."

Gosnell's technique of aborting pregnancies by inducing labor and delivery, while unnecessarily painful for the women, did not itself constitute a crime. What made his procedure criminal was that he routinely performed these abortions past the 24-week limit prescribed by law. Not only was this a crime in itself, it also meant that he

was regularly delivering babies who had a reasonable chance of survival.

Except Gosnell would not give them that chance. Pennsylvania law requires physicians to provide customary care for living babies outside the womb. Gosnell chose instead to slit their necks and store their bodies in various household containers, as if they were trash.

Although the Grand Jury learned that there is some difference of opinion as to the earliest point of viability, the experts who appeared before the Grand Jury all agreed that, by 24 weeks, organs are sufficiently developed that prognosis for survival is good. These babies can sometimes breathe on their own, though many require assistance. When a woman delivers at 24 weeks or later in a responsible medical setting, such assistance is provided, and resuscitation of the baby is routine. Indeed, a doctor's failure to provide assistance constitutes infanticide under Pennsylvania law.

Gosnell's intent to never resuscitate was obvious from his failure to employ even minimally qualified personnel or to have the equipment necessary to save the lives of newborn infants. The policy he instituted and carried out was not to try to revive live, viable babies. It was to kill them.

Gosnell severed spinal cords and suctioned and crushed skulls *after* the babies were fully delivered.

At one point in his Grand Jury testimony, Steve Massof tried to suggest that the clinic's practice of cutting babies' spinal cords was somehow part of a late-term procedure called intact dilation and extraction (IDX), commonly referred to as "partial- birth abortion" and

banned under federal law since 2007. In an intact dilation and extraction, which was used most often to abort pregnancies beyond 17 weeks, the fetus was removed from the uterus as a whole. In order for the head to pass through the cervix without damage to the mother, the doctor would collapse the fetal skull by making an incision at the base of the neck and suctioning the contents. This procedure was done while the baby was still inside the mother.

This was not the procedure Gosnell used. Under further questioning, Massof acknowledged that Gosnell and he almost always cut the spinal cords, and sometimes suctioned skulls as well, after the babies were fully expelled by their mothers, when there was clearly no need or medical reason to collapse the skull.

Tina Baldwin's testimony also made it clear that Gosnell was not cutting spinal cords, crushing babies' skulls, or suctioning in order to allow the head to pass through the cervix. Even while claiming that Gosnell sometimes suctioned a fetus's skull in order to get it through the birth canal, her description of his technique belied her claim: She said that he would "crack" the neck *after* the head was out – when only the baby's torso was still inside the mother – and *then* suction the brain matter out.

Tina Baldwin tried to explain:

> Q: He was delivering, for lack of a better word –
>
> A: Yes.
>
> Q: – a fetus?

A: Yeah.

Q: And then he was taking care of the problem after the fact?

A: Yes.

Q: Did you see him do this in instances where the fetus had been completely expelled from the mother's body before he crushed the head?

A: And then he crushed it.

Q: and then he crushed it. I mean I guess you just told the members of the jury about episodes where he would leave the shoulders or –

A: Uh-huh.

Q: -- the shoulders would be out?

A: The shoulders would be out, yeah

Q: And he would go work on the neck, you said he would crush the neck and suction the head?

A: Uh-huh.

Q: Did you ever see instances where the fetus was completely expelled from its mother's body?

A: Oh, yeah, yeah. That's what we call precipitation.

Q: What do you mean by that? Tell the members of the jury, what would happen?

A: That's when a patient would precipitate. Usually by the Cytotec that was given to the

patient and it just made the uterus so flimsy to where the baby just falls and we had a lot of patients that was second-trimester, it would just fall wherever she was at. And it was picked up and it was put in a dish and it just traveled with the mother. And then the person put the mother up on the table, the baby was put inside the – in the dish on the table and the doctor was called to come in.

Q: And then what would the doctor do when he came in?

A: Let me think back then. Usually he would check and see, check on the fetus and then I think that's when he used to go ahead and do the suction in the back of the neck.

Q: Even though the fetuses had already been removed from their mother?

A: Yeah, they had already been removed. He would just go ahead and finish it.

Q: Would he explain to you why he did that? A: No.
Q: Or why that was his practice?

A: No.

Q: Did you ever question it?
A: No.

Q: Okay, how many times would you say you've seen this?

A: Hundreds. I've seen hundreds.

Kareema Cross testified that when she first started working at the clinic, in 2005, Gosnell slit the neck of every baby. But he subsequently told the workers that the law changed so that he could not do that anymore. (The law, in fact, never allowed him to cut necks of viable babies after they were fully expelled.) Cross said that Gosnell then tried a few times to use a new procedure: He tried to inject a drug called digoxin into the fetus's heart while it was in the womb. This was supposed to cause fetal demise in utero. But because Gosnell was not skillful enough to successfully administer digoxin, late-term babies continued to be born alive, and he continued to kill them by slitting their necks.

Cross testified:

> So he tried to do the needle in the stomach and that's what was supposed to have killed the baby before the baby came out, but if it didn't, he'll say, oh, well, the law says that I can do it. I can still slit the baby's neck because it didn't work. The needle didn't work.

And according to his staff, the needle never worked. So Gosnell stopped trying and reverted to his old system of killing babies after they were born.

Gosnell's staff testified that he constantly tried to explain to them why what he was doing was legal – even though it clearly was not legal. Severing the spinal cord of viable, live babies after they have been delivered is simply murder. To then crush and suction their skulls defies medical explanation. It can only be understood as an attempt to conceal the true and only purpose of the

neat scissor incision at the back of the neck: to kill the babies.

The clinic's employees used the term "snip" to describe the severing of the spinal cord, but this is misleading. Our neonatal expert testified that, because of the bony vertebrae surrounding the spinal cord, it would actually take quite a bit of pressure to cut all the way through the spinal cord and the bone – even at 23 or 24 weeks gestation. At 29 weeks, on babies such as Baby Boy A, the expert said, "it would be really hard." The baby, we were told, would feel "tremendous pain."

When we asked our medical experts if there could be any legitimate, medical purpose behind Gosnell's practice, one said: "it would be the same as putting a pillow over the baby's face, that the intention would be to kill the baby." Another likened the practice of severing babies' spinal cords to pithing frogs in biology class.

Gosnell and his staff regularly cut necks of viable babies after observing signs of life.

Although no one could place an exact number on the instances, Gosnell's staff testified that killing large, late-term babies who had been observed breathing and moving was a regular occurrence. Massof said that Gosnell cut the spinal cord "100 percent of the time" in second-trimester (and, presumably, third-trimester) procedures, and that he did so after the baby was delivered.

Massof testified that he saw signs of life in some of these babies. He recalled seeing a heartbeat in one baby and observed a "respiratory excursion" (meaning a breath) in another. On other occasions, he observed "pulsation." Gosnell dismissed these observations as "spon-

taneous movement." "That was his answer for if we ever saw anything that was out of the ordinary, it was always a spontaneous movement."

Latosha Lewis testified that she saw babies precipitate at 23 to 28 weeks. In those cases, Massof or Gosnell:

> ... would cut the back of the neck and insert a curette, which is a plastic tubing ... that is used to do a suction. You would insert it in the back of the neck of the baby, so that the brain would come out.

Sometimes, according to Lewis, "he [Gosnell] would just snip the neck." Lewis saw babies move before Gosnell did this:

> Q. How many times did you see precipitated babies that had been fully expelled from its mother moving before he snipped the neck?
>
> A. A lot.
>
> ***
>
> Q. Can you give us a percentage of the time?
>
> A. Probably 25 percent of the time.

No steps were ever taken to attend to these babies; "we never even checked to see if [there] was a heartbeat." Lewis, who had herself given birth twice, recognized that the larger precipitated babies were viable:

> ... The bigger cases, you would see more movement or the baby would look a little bit more realer to you.
>
> Q. What do you mean?

> A. Like the skin would be a lot different. The color of the skin would be a lot different.

The Grand Jurors learned from the neonatology expert that the skin of viable babies does, in fact, appear different from the typically translucent skin of a pre-24-week fetus.

Kareema Cross said she saw Gosnell slit the neck of babies born alive "more than 15 times" – "over 10 times," when she had seen a baby breathing, and about "five times" when she had seen a baby move. She could tell these babies were breathing because "I just seen a baby's chest go up and down and it would go real fast, real fast."

Ashley Baldwin also saw Gosnell slice the neck of moving and breathing babies. When asked how many times Ashley had observed babies being delivered that were moving or breathing or crying and the doctor cut the neck, she answered: "Most of the second tris that were over 20 weeks." She said this happened probably dozens of times, maybe more. She described at least 10 babies as big enough to buy clothes for, to dress, and to take care of. She told the Grand Jury what happened to them:

> Q. And what happened to those ten babies that came out from their mother, that were big enough that you could put clothes on and take home and take care of, that moved around, what did you see happen to them?
>
> A. He killed them.
>
> Q. Who killed them?

A. Doc.

Q. How did he kill them?

A. He cut the back of the neck.

Ashley said Gosnell told her this was "normal." Tina Baldwin told the jurors that Gosnell once joked about a baby that was writhing as he cut its neck: "that's what you call a chicken with its head cut off." Although Massof was not as cavalier about what he did, he admitted that there were about 100 instances in which he severed the spinal cord after seeing a breath or some sign of life:

> Q. ... of those 100 how many were larger than 24 weeks?
>
> A. That I couldn't tell you for sure. I would have to think that they would all be because they were all able – after a certain period in weeks, you know, there's – they would have to be capable. I mean premature births are quite common.

When investigators raided the clinic in February 2010, they sent the fetuses they discovered to the Philadelphia medical examiner's office. The medical examiner concluded that two of them – aborted at 26 and 28 weeks – were viable, and another, aborted at 22 weeks, was possibly viable. The 28-week fetus, a male (Baby Boy B) had a surgical incision on the back of the neck, which penetrated the first and second vertebrae. The 22-week fetus, female, had a similar incision.

"Baby Boy B," with slit neck

Section VI: How Did This Go On So Long?

The callous killing of babies outside the womb, the routinely performed third-trimester abortions, the deaths of at least two patients, and the grievous health risks inflicted on countless other women by Gosnell and his unlicensed staff are not the only shocking things that this Grand Jury investigation uncovered. What surprised the jurors even more is the official neglect that allowed these crimes and conditions to persist for years in a Philadelphia medical facility.

THE STATE DEPARTMENT OF HEALTH NEGLECTED ITS DUTY TO ENSURE THE HEALTH AND SAFETY OF PATIENTS IN PENNSYLVANIA'S ABORTION CLINICS.

We discovered that Pennsylvania's Department of Health has deliberately chosen not to enforce laws that should afford patients at abortion clinics the same safeguards and assurances of quality health care as patients of other medical service providers. Even nail salons in Pennsylvania are monitored more closely for client safety.

The State Legislature has charged the Department of Health (DOH) with responsibility for writing and enforcing regulations to protect health and safety in abortion clinics as well as in hospitals and other health care facilities. Yet a significant difference exists between how DOH monitors abortion clinics and how it monitors facilities where other medical procedures are performed.

Indeed, the department has shown an utter disregard both for the safety of women who seek treatment at abortion clinics and for the health of fetuses after they have become viable. State health officials have also shown a disregard for the laws the department is supposed to enforce. Most appalling of all, the Department of Health's neglect of abortion patients' safety and of Pennsylvania laws is clearly not inadvertent: *It is by design.*

Many organizations that perform safe abortion procedures do their own monitoring and adhere to strict, self-imposed standards of quality. But the excellent safety records and the quality of care that these inde-

pendently monitored clinics deliver to patients are no thanks to the Pennsylvania Department of Health. And not all women seeking abortion find their way to these high-quality facilities; some end up in a filthy, dangerous clinic such as Gosnell's. There the patients have to depend on DOH oversight to protect them – as do babies born alive, and helpless but viable fetuses after 24 weeks of gestation. Yet no protection is forthcoming.

State health officials knew that Gosnell and his clinic were offering unacceptable medical care to women and girls, yet DOH failed to take any action to stop the atrocities documented by this Grand Jury. These officials were far more protective of themselves when they testified before the Grand Jury. Even DOH lawyers, including the chief counsel, brought private attorneys with them – presumably at government expense.

Gosnell's clinic – with its untrained staff, its unsanitary conditions and practices, its perilously lax anesthesia protocols, its willingness to perform late-term abortions for exorbitant amounts of cash, and its routine procedure of killing babies after they were delivered by their unconscious mothers – offers a telling example of how horrendous a Pennsylvania facility can be and still operate with DOH "approval."

The department of health conducted sporadic, inadequate inspections for 13 years, and then none at all between 1993 and 2010.

Witnesses from DOH acknowledged before the Grand Jury that it is their department's responsibility to oversee clinics such as Gosnell's. Pennsylvania's Abortion Control Act charges DOH with regulating and over-

seeing the performance of abortions and the facilities where abortions are performed "so as to protect the health and safety of women having abortions and of premature babies aborted alive." 18 Pa.C.S. §3207(a). Abortion facilities require the department's approval to begin operating.

The Department of Health first granted approval for the Women's Medical Center to provide abortions at 3801 Lancaster Avenue on December 20, 1979. The approval followed an on-site review and was good for 12 months. The DOH "site review" at the time identified a certified obstetrician/gynecologist, Joni Magee, as the medical director, with Gosnell listed as a staff physician. The report noted that a registered nurse worked two days a week, four hours a day, and that lab work was sent out to an outside laboratory.

Other topics covered in the 1979 site review included: counseling for women to be sure they had considered alternatives to abortion and were sure about their decision; the physical facility (whether there was adequate space, and whether wheelchairs and stretchers could maneuver through doorways and to the outside); cleaning procedures; emergency preparedness (including the availability of resuscitation equipment and arrangements with an ambulance service and hospital for emergency treatment); and procedures for before, during, and after the operation. It is unclear from the site review who provided most of the information, but much of it appears to come from staff interviews. One significant finding in the 1979 evaluation was that there was adequate access for a stretcher, something that proved not to be the case when

EMTs needed to transport Karnamaya Mongar from the facility in November 2009.

Even though the first DOH Certificate of Approval for Gosnell's clinic expired on December 20, 1980, the next documented site review was not conducted until August 1989. (There is a notation on the 1989 report that a review was conducted in February 1986, but DOH could not provide any documentation of it in response to the Grand Jury's subpoena.) The 1989 evaluation was conducted by Elizabeth Stein and Susan Mitchell. Over 20 years later, Mitchell was part of the team that inspected Gosnell's clinic in February 2010 when law enforcement officials invited DOH to participate in their search.

By 1989, Gosnell, who is not board-certified as either an obstetrician or a gynecologist, was the only doctor at the facility. The DOH site reviewers also noted that there were no nurses working at the clinic. Blood work was no longer sent out to an independent lab, but was done, supposedly, by "medical assistants." And in 7 of the 30 patient files reviewed, there was no lab work recorded. The evaluators noted several violations of Pennsylvania abortion regulations, including: no board-certified doctor on staff or contracted as a consultant; no nurses overseeing the recovery of patients; no transfer agreement with a hospital for emergency care; and no lab work recorded in several files. Even so, based on mere promises to improve documentation and filing, and to hire nurses, the DOH site reviewers recommended approval of Gosnell's clinic for another 12 months.

Two and a half years later, in March 1992, when DOH representatives next inspected the clinic, there were still no nurses to monitor patient recovery. Evaluators Janice Staloski and Sara Telencio noted that Gosnell was still the only doctor (a Dr. Martin Weisberg was listed as a consultant); that the facility employed no nurses; and that medical assistants were doing lab work. They did indicate there was adequate access for stretchers and wheelchairs, though it is not clear how they reached this conclusion: The facility is multi-leveled and has no elevator.

There is nothing to suggest that these evaluators reviewed any patient files. Gosnell reported performing 62 second-trimester abortions in the previous year, yet the DOH inspectors left blank the section in their report on anesthesia, including who is permitted to give it, what their qualifications are, and the type of anesthesia they are permitted to administer. Also left blank was a section titled "Post-Operative Care," which addresses the legal requirement that the recovery room be monitored at all times by a registered nurse or a licensed practical nurse under the supervision of a physician – the same regulation that the clinic was cited for violating three years earlier. Nevertheless, the evaluators inexplicably concluded on March 12, 1992, that there were "no deficiencies," and DOH approved Gosnell's clinic to continue to perform abortions.

The next inspection was conducted on April 8, 1993, by DOH evaluators Susan Mitchell and Georgette Freed-Wolf. This was also the *last* site review – until February 2010, when an inspection occurred because law

enforcement executed search warrants for illegal drug activity. In the 1993 review, Gosnell was the only doctor listed on staff, but "Dr. Weisberg" was still described as a consultant. Four years after Gosnell had promised to hire nurses to oversee the recovery room, there was still none. Lab work was still being performed by unspecified "medical assistants," whose qualifications the evaluators apparently did not question, since that section of the review was left blank. For the third time, inspectors found the access for stretchers and wheelchairs adequate, even though the facility's layout had become even more convoluted and the building still did not have an elevator.

The 1993 site review did not include any first-hand observations about the cleanliness of the facility or the condition of the emergency equipment required for resuscitation. Instead of making their own inspection, the evaluators appeared to have relied on representations by staff about procedures for cleaning and checking equipment. They did, however, find drugs past their expiration dates. In reviewing 12 patient files, the surveyors found that 4 involved second-trimester abortions. In three of these four files, there were no pathology reports on the tissue, as required by the Abortion Control Act. In one file, there was no evidence that the tissue was sent to a pathologist at all. In 3 of the 12 files, the evaluators found that required lab work was missing.

On July 23, 1993, without a follow-up inspection, Susan Mitchell recorded that the deficiencies had been corrected. DOH sent Gosnell another Certificate of Approval. The certificate stated that it was "Effective From The

1st Day Of April 1993 Until March 31, 1994 In Accordance With Law."

Gosnell's clinic had, on May 1, 1993, submitted an "Abortion Facility Registration Form" to DOH. Whoever filled it out (it is not signed), filled in the name of the facility – Women's Medical Society – and its mailing address, and checked off boxes indicating that the Women's Medical Society had no parent, subsidiaries, or affiliated organizations and whether or not it had received state funds in the preceding 12 months.

During the next *16 plus years* – as Gosnell collected fetuses' feet in jars in his office and allowed medical waste to pile up in the basement; as he replaced his few licensed medical assistants with untrained workers and a high school student; as his outdated equipment rusted and broke and he routinely reused instruments designed for single-use; as he allowed unqualified staff to administer anesthesia and to deal with babies born before he arrived at work for the day; and as he caused the deaths of at least two patients while continuing to perform illegal third-trimester abortions and to kill babies outside their mothers' wombs – DOH never conducted another on-site inspection at the Lancaster Avenue facility.

The state Department of Health failed to investigate Gosnell's clinic even in response to complaints.

According to DOH witnesses, sometime after 1993, DOH instituted a policy of inspecting abortion clinics only when there was a complaint. In fact, as this Grand Jury's investigation makes clear, the department did not even do that.

Janice Staloski, one of the evaluators of Gosnell's clinic in 1992, 10 years later was the Director of DOH's Division of Home Health – the unit that is inexplicably responsible for overseeing the quality of care in abortion clinics. In January 2002, an attorney representing Semika Shaw, a 22-year-old woman who had died following an abortion at Gosnell's clinic, wrote to Staloski requesting copies of inspection reports for any on-site inspections of the clinic conducted by DOH. Staloski wrote to the attorney that no inspections had been conducted since 1993 because DOH had received no complaints about the clinic in that time.

Except that it had. In 1996, another attorney, representing a different patient of Gosnell's, informed Staloski's predecessor as director of the Home Health Division that his client had suffered a perforated uterus, requiring a radical hysterectomy, as a result of Gosnell's negligence. The Home Health director discussed this patient with DOH Senior Counsel Kenneth Brody, and the complaint report was documented in records turned over to the Grand Jury. It was surely available to Staloski when she inaccurately told the attorney in January 2002 that DOH had received no complaints regarding Gosnell's clinic.

Not documented in the records turned over to the Grand Jury was a second complaint registered between 1996 and 1997. This one was hand-delivered to the secretary of health's administrative assistant by Dr. Donald Schwarz, now Philadelphia's health commissioner. Dr. Schwarz, a pediatrician, is the former head of adolescent services at Children's Hospital of Philadelphia and was

the directing physician of a private practice in West Philadelphia. For 17 years, he treated teenage girls from the West Philadelphia community. Occasionally, he referred patients who wanted to terminate their pregnancies to abortion providers.

Gosnell's clinic was originally included as a provider in the referral information that Dr. Schwarz gave to his patients. He and his physician partners noticed, however, that patients who had abortions at Woman's Medical Society were returning to their private practice, soon after, infected with trichomoniasis, a sexually transmitted parasite, that they did not have before the abortions.

When this happened repeatedly, Dr. Schwarz sent a social worker to talk to people at Gosnell's facility. Based on the social worker's visit to Women's Medical Society, Dr. Schwarz stopped referring patients to the clinic. He also hand-delivered a formal letter of complaint to the office of the Pennsylvania Secretary of Health.

Dr. Schwarz told the Grand Jury that he does not know what happened to his complaint. He never heard back from DOH. And the department did not include it in response to the Grand Jury's subpoena requesting all complaints relating to Gosnell's' clinic. We know that no inspection resulted.

We are very troubled that state health officials ignored this respected physician's report that girls were becoming infected with sexually transmitted diseases *at Gosnell's clinic* when they had abortions there. If Dr. Schwarz's complaint did not trigger an inspection, we are convinced that none would.

We also do not understand how a report of this magnitude was not at least added to Gosnell's file at the state department of health. It suggests to us that there may have been many more complaints that were never turned over to the Grand Jury.

We heard testimony from DOH officials who should have been aware of Dr. Schwarz's complaint – Kenneth Brody and Janice Staloski, at the least. Yet they made no mention of it to the Grand Jury. Did they remember the complaint and choose to exclude it from their testimony? Is ignoring complaints of this seriousness so routine at DOH that they honestly do not remember it? Or did the secretary of health never even forward it on for action? Of these possible explanations, we are not sure which is the most troubling.

In addition to these two complaints filed in 1996 and 1997, Staloski herself received two inquiries from attorneys' offices about Gosnell's clinic in the first two months of 2002. One was from the Shaw family's attorney. The other was from a paralegal for yet a third attorney who phoned her on February 6, 2002, asking for information concerning the clinic. Surely these two inquiries in 2002 should have alerted Staloski that there were complaints from at least two people about the clinic, complaints serious enough to warrant civil attorneys' involvement. Yet she ordered no investigation of the clinic, even though it had not been site-reviewed *in nine years*.

In 2007, Dr. Frederick Hellman, the Medical Examiner for Delaware County, reported to DOH the stillbirth of a 30-week-old baby girl. A medical examiner investigator, Irene LaFlore, made the phone calls. She spoke to

several DOH employees, including Brody, the senior counsel. The investigator reported to the DOH officials that the medical examiner had conducted an autopsy on the stillborn baby delivered by a 14- year-old girl at Crozier-Chester Medical Center. She explained that the baby's delivery had been induced in the course of an abortion performed by Gosnell, and that the medical examiner was concerned because performing an abortion at 30 weeks was a clear violation of the Abortion Control Act.

According to the investigator's notes, Brody suggested that the medical examiner inform the District Attorney's Office in Delaware County – for possible referral to Philadelphia, where the procedure occurred – because it was a crime to perform an abortion beyond 24 weeks. Brody said that neither DOH nor the state medical board had any authority over the matter. The senior counsel did ask the investigator to keep him informed. The investigator's notes suggest Brody told her that, once the district attorney acted, then the medical board could get involved.

Brody was correct to refer Dr. Hellman to the district attorney to prosecute the abortion of the 30-week pregnancy as a crime. That, however, did not absolve DOH of its responsibility. The information provided by Dr. Hellman's investigator should have been received as a complaint to DOH. The department should have initiated an investigation. DOH could have revoked the clinic's license without waiting for a criminal prosecution that might never (and did not) happen. Yet no one from the department went to investigate Gosnell's clinic.

Since February 2010, Department of Health officials have reinstituted regular inspections of abortion clinics – finding authority in the same statute they used earlier to justify not inspecting.

Staloski blamed the decision to abandon supposedly annual inspections of abortion clinics on DOH lawyers, who, she said, changed their legal opinions and advice to suit the policy preferences of different governors. Under Governor Robert Casey, she said, the department inspected abortion facilities annually. Yet, when Governor Tom Ridge came in, the attorneys interpreted the same regulations that had permitted annual inspections for years to no longer authorize those inspections. Then, only complaint- driven inspections supposedly were authorized. Staloski said that DOH's policy during Governor Ridge's administration was motivated by a desire not to be "putting a barrier up to women" seeking abortions.

Brody confirmed some of what Staloski told the Grand Jury. He described a meeting of high-level government officials in 1999 at which a decision was made *not* to accept a recommendation to reinstitute regular inspections of abortion clinics. The reasoning, as Brody recalled, was: "there was a concern that if they did routine inspections, that they may find a lot of these facilities didn't meet [the standards for getting patients out by stretcher or wheelchair in an emergency], and then there would be less abortion facilities, less access to women to have an abortion."

Brody testified that he did not consider the "access issue" a legal one. The Abortion Control Act, he told the Grand Jurors, charges DOH with protecting the health

and safety of women having abortions and premature infants aborted alive. To carry out this responsibility, he said, DOH should regularly inspect the facilities.

Nevertheless, the position of DOH remained the same after Edward Rendell became governor. Using the legally faulty excuse that the department lacked the authority to inspect abortion clinics, Staloski left them unmonitored, presumably with the knowledge and blessing of her bosses, Deputy Secretary Stacy Mitchell and a succession of Secretaries of Health. The department continued its do-nothing policy until 2010, when media attention surrounding the raid of the Gosnell clinic exposed the results of years of hands-off "oversight." Now, once again, the regulations, which have never been modified, apparently allow for regular inspections. This is, and always was, the correct position. The state legislature gave DOH the duty to enforce its regulations; the authority and power to do so are implicit in that duty. The department abandoned this responsibility without explanation, and without notice to the public or the legislature.

Whatever its motivation, DOH's deliberate policy decision not to conduct regular inspections of abortion clinics did not serve the women of this Commonwealth. Nor did it protect late-term fetuses or viable babies born alive. The Grand Jury heard testimony from legitimate abortion providers and from abortion-rights advocates, and not one indicated that annual inspections would be unduly burdensome. The doctors we heard from, and the organizations that refer women to abortion providers, told us that the reputable providers comply with all of the state regulations and more. Annual inspections are

not an issue with them. Many clinics in Pennsylvania are already inspected by NAF, whose standards are, in many ways, more protective of women's safety than are the state's regulations.

Without regular inspections, providers like Gosnell continue to operate; unlawful and dangerous third-trimester abortions go undetected; and many women, especially poor women, suffer. These are all consequences of DOH's abdication of its responsibility.

Moreover, even if Staloski was instructed not to conduct regular, annual inspections, that does not explain why she failed to order inspections when complaints *were received.* It is clear to us that she was made aware, numerous times, that serious incidents had occurred at Gosnell's clinic. These incidents, which evidenced alarming as well as illegal long-standing patterns of behavior, warranted investigation. Yet, in all the years she worked at the department, Staloski never ordered *even one* inspection.

Not even Karnamaya Mongar's death triggered an inspection or investigation.

On November 24, 2009, Gosnell sent a fax to the department, followed by a letter addressed to Staloski, notifying DOH that Karnamaya Mongar had died following an abortion at his clinic. (Gosnell's letter inaccurately stated that the second day of her procedure was November 18.) Darlene Augustine, a registered nurse and health quality administrator in the department's Division of Home Health, received the fax.

Augustine, who supervises surveyors who respond to and investigate complaints at health care facilities, testi-

fied that she immediately notified her boss, Cynthia Boyne. (Boyne had become director of DOH's Division of Home Health in 2007, when Staloski was promoted to head the Bureau of Community Licensure and Certification.) Augustine said that she told Boyne on November 25 that DOH should immediately go out to the clinic and initiate an investigation. Augustine acknowledged that she generally had the authority to send surveyors out to investigate – and she often did so within an hour of receiving a notice of a serious event such as a death. She testified, however, that she felt she needed Director Boyne's approval because Gosnell's notice involved an abortion clinic.

Boyne did not give her approval. Instead, she went to the bureau director, Staloski, to discuss the matter. Augustine explained that abortion clinics were treated differently from other medical facilities because Staloski had for years overseen the department's handling of complaints and inspections – or lack of inspections – relating to abortion clinics. Staloski, according to Augustine, was "the ultimate decision-maker" with respect to whether DOH would conduct an inspection or investigation. Augustine testified that neither Boyne nor Staloski ever gave her approval to conduct the investigation that she thought was appropriate.

Boyne blamed Staloski. She said that her boss told her that DOH did not have the authority to investigate Mrs. Mongar's death. Staloski apparently reached this decision on her own, without ever consulting Brody, the legal counsel. Staloski, according to Boyne, was only interested in making sure that Gosnell filed an on-line re-

port in accordance with a 2002 law, the Medical Care Availability and Reduction of Error (MCARE) Act. That law requires health care facilities to report serious events, including deaths to DOH. 40 P.S. §313.

Staloski's plan, Boyne said, was to then charge Gosnell with failing to file the report in a timely and proper manner. This is absurd, and Boyne should not have accepted such a ridiculous idea. Gosnell had reported Mrs. Mongar's death to DOH on November 24, 2009. While this was three or fours days late, and the notification came by fax and letter rather than computer, it is preposterous to think that Staloski, who had ignored two deaths and other serious injuries at the clinic, would take action against a doctor for filing a report three days late. Staloski was absolutely wrong about DOH's lack of authority to investigate Mrs. Mongar's death.

Appallingly, the chief counsel for the department of health, Christine Dutton, defended Staloski's inaction following Mrs. Mongar's death. Dutton testified that she had reviewed the emails and documents showing that Staloski and her staff were communicating with Gosnell's office to get him to file the MCARE form. Based on these very minimal efforts, Dutton insisted: "we were responsive." Pushed as to whether the death of a woman following an abortion should have prompted more action – perhaps an investigation or a report to law enforcement – Dutton argued there was no reason to think the death was suspicious. "People die," she said.

Not only was a probe into Mrs. Mongar's death authorized and appropriate under the Abortion Control Act, it was required under the MCARE law. 40 P.S.

§306. Yet DOH did not investigate. Staloski told the Grand Jury that she remembered reviewing with Boyne the letter in which Gosnell notified DOH of Mrs. Mongar's death. Staloski said that it was really Boyne's responsibility to order an investigation, but acknowledged that she, as the bureau director, also failed to do so. Instead of conducting an investigation, Staloski and Boyne concerned themselves with badgering Gosnell to renotify them of Mrs. Mongar's death.

Bureau Director Staloski, in fact, readily acknowledged many deficiencies in DOH's, and her own, oversight of abortion facilities. But her dismissive demeanor indicated to us that she did not really understand – or care about – the devastating impact that the department's neglect had had on the women whom Gosnell treated in his filthy, dangerous clinic.

Staloski excused the DOH practices that enabled Gosnell to operate in the manner that killed Ms. Shaw, Mrs. Mongar, and untold numbers of babies. She simply said the abortion regulations – *written by DOH* – do not require DOH to inspect abortion clinics.

When DOH inspectors finally entered Gosnell's clinic in February 2010, not at Staloski's direction but at the urging of law enforcement, Staloski seemed more annoyed than appalled or embarrassed. On the morning after the raid, she received a copy of an email that Boyne wrote to Brody the night of the raid. Boyne reported to the department's senior counsel that, at 12:45 a.m., she had told the Department of Health staff members at the clinic to "wrap it up and secure lodging in the interest of their safety." Boyne told Brody that the "staff walked

into a very difficult setup." She complained that a representative of the District Attorney's Office was "badgering" DOH staff to shut down the facility immediately. Boyne was seeking Brody's legal guidance.

Staloski's response to Boyne's email was: "I'd say we were used." Boyne's reply: "Bingo."

Staloksi, the woman most directly responsible for the department's oversight of abortion facilities, told the Grand Jury: "I haven't been in any facilities in probably – in an abortion facility in many, many years." The citizens of Pennsylvania deserve far better from those charged with protecting public health and safety.

Department of Health evaluators found multiple grounds to shut down the Women's Medical Society once they finally entered the facility.

It was not until February 18, 2010, when DOH representatives were escorted in by law enforcement agents, that they finally inspected the clinic that they had not bothered to visit in 13 years. This time, neglecting the horrors at 3801 Lancaster Avenue was no longer an option. Over the next few days, the DOH evaluators identified a multitude of violations of the Abortion Control Act and abortion regulations, many of which were apparent with even a cursory glance around the facility.

The abortion regulations promulgated by DOH (28 Pa. Code §29.33(1)) require that abortion providers have the following ready for use to resuscitate patients whenever anesthesia is used:

(i) Suction source.

(ii) Oxygen source.

(iii) Assorted size oral airways and endotracheal tubes.

(iv) Laryngoscope.

(v) Bag and mask and bag and endotracheal tube attachments for assisted ventilation.

(vi) Intravenous fluids including blood volume expanders.

(vii) Intravenous catheters and cut-down instrument tray.

(viii) Emergency drugs for shock and metabolic imbalance.

(ix) An individual to monitor respiratory rate, blood pressure, and heart rate.

When patients are sedated to the point of being deeply asleep, as they were when Gosnell performed second-trimester abortions, additional equipment is required. Even when the sedation is less deep – a level referred to as conscious sedation, in which the patient can still respond to verbal instructions – Pennsylvania regulations require that additional equipment be readily available, including a "monitor defibrillator with electrocardiogram visual display of heart rate and rhythm" (ECG) and a pulse oximeter.

Women's Medical Society effectively had none of this. A document filed by DOH on March 12, 2010, referred to as an "Order to Show Cause," laid out several grounds for shutting the clinic. It stated that the only items on the list that were in the facility in any form were suction and oxygen sources and an unusable monitor defibrilla-

tor and ECG. Yet there was only one suction source for each procedure room, meaning that the same suction source used to perform the abortion would have to be used to resuscitate patients. The DOH document noted, moreover, that neither suction machine had an inspection sticker to indicate that it was functioning properly. The suction tubing on both machines was corroded, according to the report.

As for the supposed oxygen sources, DOH noted:

> One oxygen source was an E cylinder oxygen tank that lacked a label to indicate whether the tank was full or empty. The oxygen mask and tubing hanging from the tank were covered in a thick gray layer of a substance that appeared to be dust. The other oxygen source at the facility was an oxygen concentrator covered with a thin layer of dust. The oxygen concentrator bore no inspection sticker and no evidence of inspection to assure proper functioning. There was no oxygen mask or tubing with the oxygen concentrator.

The DOH document stated that the monitor defibrillator and ECG not only had no inspection sticker, but was unusable because there were no electrodes to attach to the machine. Latosha Lewis testified that the machine had been broken for at least six years.

As the DOH Order to Show Cause noted in "Count I," each time Gosnell performed a procedure without the required equipment and drugs for resuscitation, he violated the abortion regulations §29.33(1). He also violated §29.33(4) by failing to have a doctor certified by the

American Board (or Osteopathic Board) of Obstetrics and Gynecology either on staff or available as a consultant. (Count II.) The Department of Health also cited the clinic for failing to conduct or to record required lab tests in violation of §29.33(6). (Counts III and IV.)

After entering Gosnell's facility with law enforcement agents, DOH representatives reviewed the files of some of its patients (some of whom were present and had procedures on February 18, 2010, when the search was conducted; and some of whom had had procedures in the previous few months). Nine of the patients had had second-trimester abortions. Under Pennsylvania's abortion regulations, abortion providers are required to send any tissue from second-trimester procedures to a pathologist to determine whether there is evidence of viability. Gosnell had failed to do this for any of the nine patients, thus violating §29.33(8) nine times. (Count V.)

The Department of Health also charged Gosnell's clinic with failing to have written procedures and policies for the administration of anesthesia and for failing to maintain a list of employees permitted to administer it. These failures constituted violations of §29.33(12). (Count VI.) Other violations detailed by DOH in March 2010 were the failure to have patients in recovery monitored by a registered nurse or a licensed practical nurse, or to have such nurses enter the doctor's orders in the patients' medical records as required by §29.33(13). (Counts VII and VIII.)

The DOH document stated (in Count IX) that the clinic violated §29.33(14) of the abortion regulations by failing to have corridor doors and passages adequate in

size and arrangement to allow a stretcher-borne patient to be moved from each procedure room and recovery room to a street-level exit. DOH noted that ambulance crews on February 18, 2010, had wanted to evacuate two patients from Gosnell's clinic on stretchers, but instead had to help them walk through the corridors. The situation was made even worse because the closest exit door to the street was padlocked shut, and the staff could not find the key.

Count X alleged that Gosnell failed to ensure that one of the patients having an abortion on February 18, 2010, had a private consultation regarding the necessity of her abortion, as required by §29.32. Count XI stated that the clinic failed to report the death of Karnamaya Mongar within 24 hours as required under 40 Pa.C.S. §1303.313(a) (the Medical Care Availability and Reduction of Error, or MCARE, Act).

Count XII spelled out a violation of §29.38(a)(5) of the abortion regulations, which requires doctors to file a "Report of Complication" with DOH any time they treat a patient as a result of a complication from an abortion. The complication that Gosnell treated, but allegedly did not report, was the cardiac arrest suffered by Karnamaya Mongar.

Count XIII accused the clinic of violating §29.38(5), which requires abortion providers to file quarterly reports with DOH, stating the number of abortions performed by the facility in each trimester of pregnancy. The most recent report filed by Gosnell's clinic stated that it had performed 118 first-trimester and 2 second-trimester abortions in the fourth quarter of 2009. But

even in the few files that DOH evaluators reviewed in February 2010, there were six second-trimester procedures performed in the last two months of 2009.

The last count in the DOH document – Count XIV – cited the failure to file reports on every abortion performed, as required by §29.38(3). Specifically, DOH stated that Gosnell did not file reports on six of the women whose files DOH reviewed in February 2010. This failure violated the abortion regulations and constituted grounds for revoking DOH approval to perform abortions.

Indeed, each of the violations enumerated by the DOH Order to Show Cause constitutes grounds for revoking the clinic's approval to perform abortions under §29.43(d) – many times over, in fact. Once the DOH inspectors entered the facility in February 2010, they did a thorough job of inspecting Gosnell's clinic and moved quickly to revoke its "approval," based on the clinic's many flagrant violations of law.

The travesty, from this Grand Jury's perspective, is that DOH could and should have closed down Gosnell's clinic years before. Many, if not all, of the violations cited in the March 12, 2010, document had been present *for nearly two decades*. The violations had been apparent when DOH site-reviewers, including Susan Mitchell and Janice Staloski, inspected the facility in 1989, 1992, and 1993. Yet it was not until law enforcement discovered the horrendous conditions inside 3801 Lancaster Avenue that DOH took action to close the clinic.

The state Department of Health monitors other comparable health care facilities to assure quality care.

The Department of Health's decades-long neglect of its duty to ensure the health and safety of women undergoing medical procedures in abortion clinics is in stark contrast to its policies and practices with respect to procedures performed in other types of health care facilities.

DOH's authority and duty to regulate, license, and oversee the operation of various health care facilities arises from the Health Care Facilities Act, 35 Pa.C.S. §448.102 et seq. The purpose of the Act is spelled out in §448.801a:

> It is the purpose of this chapter to protect and promote the public health and welfare through the establishment and enforcement of regulations setting minimum standards in the construction, maintenance and operation of health care facilities. Such standards are intended by the legislature to assure safe, adequate and efficient facilities and services, and to promote the health, safety and adequate care of the patients or residents of such facilities. It is also the purpose of this chapter to assure quality health care through appropriate and nonduplicative review and inspection with due regard to the protection of the health and rights of privacy of patients and without unreasonably interfering with the operation of the health care facility or home health agency.

The Health Care Facilities Act charges DOH with the oversight of health care facilities including hospitals, home health care agencies, nursing facilities, cancer treatment centers, birth centers, and ambulatory surgical centers. The health department regulates, licenses, and monitors each of these types of facilities differently. The type of facility that is relevant to this Grand Jury's investigation is the "ambulatory surgical facility" (ASF).

The Health Care Facilities Act defines an Ambulatory Surgical Facility as:

> A facility or portion thereof not located upon the premises of a hospital which provides specialty or multispecialty outpatient surgical treatment. Ambulatory surgical facility does not include individual or group practice offices of private physicians or dentists, unless such offices have a distinct part used solely for outpatient surgical treatment on a regular and organized basis. For the purposes of this provision, outpatient surgical treatment means surgical treatment to patients who do not require hospitalization, but who require constant medical supervision following the surgical procedure performed.

This is precisely what Gosnell's clinic was – a facility that provided specialty outpatient surgical treatment. And, by definition, so are all freestanding abortion clinics (those not associated with hospitals). The regulations that DOH wrote pursuant to the Abortion Control Act (18 Pa. C.S. §3201 et seq.) are entitled "Regulations for

Ambulatory Gynecological Surgery" (28 Pa. Code 29.1, et seq.). Section 29.33(13) expressly requires:

> Each patient shall be supervised constantly while recovering from surgery or anesthesia, until she is released from recovery by a registered nurse or a licensed practical nurse under the direction of a registered nurse or a physician. The nurse shall evaluate the condition of the patient and enter a report of the evaluation and orders in the medical record of the patient.

The plain language of the Health Care Facilities Act mandates that abortion clinics should be regulated, licensed, and monitored as Ambulatory Surgical Facilities. DOH licenses many types of facilities as ASFs, including endoscopy centers, where colonoscopies are performed; offices where plastic surgery procedures such as liposuction, facelifts, and breast augmentation are performed; and eye surgery centers. Under the regulations written by DOH, such facilities must be inspected and licensed *yearly*. In addition, DOH inspectors are expressly authorized to inspect ASFs, at any time, announced or unannounced, to investigate any complaints (28 Pa. Code §§ 551.31 through 551.51).

The regulations for Pennsylvania ASFs – which run over 50 pages – provide a comprehensive set of rules and procedures to assure overall quality of care at such facilities. They include, for example, measures for infection control (28 Pa. Code. §567.3 lists 17 specific actions that ASFs have to take to control infection); a requirement that linens be sterile (§567.21-24); and a requirement

that the premises and equipment be kept clean and free of vermin, insects, rodents, and litter (§567.31).

The ASF regulations devote three pages to anesthesia protocols alone. They not only spell out the equipment a facility must have, but also require that the equipment actually be used to monitor patients under anesthesia. "At a minimum," 28 Pa. Code §555.33(6) requires:

> (i) The use of oxygen saturation by pulse oximetry.
>
> (ii) The use of End Tidal CO [2] monitoring during endotracheal anesthesia.
>
> (iii) The use of EKG monitoring.
>
> (iv) The use of blood pressure monitoring.

And §555.33(5) requires:

> (5) A patient receiving anesthesia shall have an anesthetic record maintained. This shall include a record of vital signs and all events taking place during the induction of, maintenance of and emergence from anesthesia, including the dosage and duration of anesthetic agents, other drugs and intravenous fluids.

These and other ASF regulations set out basic, minimum standards of care that any patient having a surgical procedure should expect to receive when anesthesia is involved. They are the standards that DOH came up with when charged by the legislature to assure safe, adequate, and efficient facilities and services and to promote the health, safety, and adequate care of patients.

The law exists. The regulations are clear. Why does DOH not apply or enforce these standards for abortion facilities?

The state Department of Health inexplicably allows abortion clinics, alone, to go unmonitored.

The Grand Jury asked several DOH employees, attorneys as well as those charged with overseeing abortion facilities, why the department does not treat abortion clinics as ASFs when the language of the Health Care Facilities Acts is so clear. Their unsatisfactory answers left us bewildered.

The two attorneys closest to the issue – Senior Counsel Kenneth Brody, who advises the Division of Home Health, which currently oversees abortion clinics; and Senior Counsel James Steele, who advises the division that oversees ambulatory surgical facilities – both testified that they believe that abortion clinics such as Gosnell's fit within the law's definition of an ambulatory surgical facility. Their boss, Chief Counsel Christine Dutton, refused to acknowledge that the ASF definition would cover abortion clinics, but could not explain why it did not. She said she "would have to research that to determine if that were the case."

Dutton, however, before becoming chief counsel, was assigned to advise the DOH division that licenses ambulatory surgical facilities. As such, she had to be very familiar with what constitutes an ambulatory surgical facility. In fact, she was senior counsel to the division when DOH was dealing with the aftermath of the death, in 2001, of a 19- year-old girl following liposuction performed in a plastic surgeon's office. When the girl's par-

ents complained to DOH, an immediate investigation revealed that the office of the surgeon, Dr. Richard Glunk, should have been licensed as an ASF, but was not.

As a result of the Glunk case, DOH initiated a campaign to encourage compliance with ASF licensure requirements. Chief Counsel Dutton would have been in the middle of that effort in 2002 when she was senior counsel. Yet she testified that she never considered treating abortion clinics – facilities where, according to the abortion regulations, "ambulatory gynecological surgery" is performed – as ambulatory surgical facilities.

It was clear to us after hearing these witnesses testify that the decisions not to inspect abortion clinics or to license them as ASFs were not based on any serious interpretation of statutes or legal research. These lawyers were simply twisting and reinterpreting the law to explain policy decisions that changed with administrations, even though the laws did not. Dutton admitted in her testimony that the decision not to inspect was a policy decision, not one grounded in the law:

> Q: Does it surprise you to know that some of the reasons cited for the failure to go out and do these inspections is that they believed that they didn't have the legal authority to do so?
>
> A: That would surprise me, yes. To me, I would believe that they didn't go out to do them because some policy had been set in the department at some point in time in the past that we were not going to do regular inspections of abortion facilities.

Dutton's failure to recognize and treat abortion clinics as ASFs, and her silence as DOH shirked its duty to protect women and infants at abortion clinics, reflect a blatant refusal to enforce the law.

The DOH attorneys offered multiple explanations to attempt to justify why the department does not license abortion clinics in the same manner as any other ASF None of their explanations comports with the law or with common sense.

Two of their "justifications" are barely worth comment. One lawyer told us that there is always "push-back" from doctors who do not want to be licensed as ASFs. Not only is this argument irrelevant to any legal analysis, it is unpersuasive. We learned that there are fewer than 30 abortion providers in the entire state. These doctors should not be able to exert that much push-back. Moreover, the legitimate abortion providers who testified before the Grand Jury told us that they already comply with standards as demanding as those for ASFs. Abortion rights advocates told us the same thing – that licensing abortion clinics as ASFs would not be burdensome because clinics that are members of NAF, or associated with Planned Parenthood, already comply with the highest standards of care.

A second reason proffered by DOH attorneys for not licensing abortion clinics – that abortion is "controversial" – is just insulting. Abortion is a legal medical procedure. Any controversy surrounding the issue should not affect how the law is enforced or whether the Department of Health protects the safety of women seeking health care.

Finally, Dutton, Brody, and Steele asserted that a provision of the abortion regulations – one that gives DOH the authority to approve facilities as abortion providers – somehow precludes any other health care law from applying to abortion clinics. The provision of the abortion regulations that DOH relies on to exempt abortion clinics from the requirements of the Health Care Facilities Act reads:

> Facility approval
>
> **(a) Every medical facility which performs abortions within this Commonwealth shall be approved by the Department.**
>
> (b) All medical facilities except hospitals may become approved facilities upon submission of an application to the Department from a person authorized to represent such facility and, at the discretion of the Department, satisfactory completion of an onsite survey.
>
> (c) **Every hospital** licensed or approved by the Department, which has filed with the Department the Abortion Facility Registration form, and which meets the standards set forth in this title, will be deemed to be an approved facility by virtue of its hospital license or approval
>
> (d) Notwithstanding this section, facility approval for performance of abortions may be revoked if this subchapter is not adhered to.

28 Pa. Code § 29.43 (emphasis added).

On its face, this explanation is nonsensical. The cited provision requires not only clinics, but also hospitals, to obtain DOH approval before abortions can be performed. This added approval requirement certainly does not exempt hospitals from all other applicable licensing requirements. Indeed section (c) assumes and refers to the licensing of the hospitals. This provision can no more remove abortion facilities from the regulations covering ASFs than it can remove DOH oversight responsibilities for hospitals.

If one were to accept DOH's interpretation of its duties with respect to overseeing the quality of care in abortion facilities, those duties would be limited to granting or denying approval based on a single piece of paper – the "Abortion Facility Registration Form," which contains the name and mailing address of a facility and a couple of check marks. Brody said that it is DOH practice to conduct an on-site survey of facilities before granting approval, but acknowledged that even that feeble effort at oversight is discretionary under the regulations. Then, once the initial approval is given, DOH – according to the rules that it wrote and interprets – never has to do anything else to monitor what happens in the abortion clinic.

Dutton, the chief counsel, testified that DOH's only role with respect to abortion clinics is to collect certain reports from them:

> Q: So which department of the Commonwealth of Pennsylvania is responsible for enforcing the Abortion Control Act?

A: Primarily the Department of State and the District Attorney's Office and other law enforcement.

Q: What about the Department of Health?

A: We have a role in enforcing it if certain reports are not filed and we become aware of the fact that that they're not filed.

Q: And that's it?

A: Uh-huh.

Q: So it's just a paper thing?

* * *

A: Yes. When you read the act, that is what it unfortunately says.

The DOH attorneys all complained similarly about how little authority the Abortion Control Act, and the accompanying regulations that DOH wrote, gives to the department to inspect, license, or monitor abortion clinics. But it is these lawyers who are responsible for allowing their department to ignore the plain language of the Health Care Facilities Act.

That act gives DOH all the power it needs to assure safe abortion clinics. Yet, instead of applying the law as it is written, and counseling DOH to license abortion clinics as ASFs, these lawyers have used illogical arguments to evade the Health Care Facilities Act. They have insisted that a criminal statute, the Abortion Control Act, provides DOH's only authority to protect the health and safety of women and premature infants aborted alive

within abortion clinics. Essentially, they have tied their own hands and now complain that they are powerless.

The Secretary of Health has, since the February 2010 raid, ordered the department to start inspecting abortion clinics regularly. Nevertheless, the larger point remains: Women who go to abortion clinics and premature babies born alive at them deserve the same DOH protection as patients at other health care facilities. Abortion is legal, and political agendas should not influence how DOH carries out its responsibility to ensure the health and safety of medical patients at all facilities.

Pennsylvania's abortion regulations, written by the Department of Health, are totally inadequate to protect the health and safety of women at abortion clinics.

The abhorrent conditions and practices inside Gosnell's clinic are directly attributable to the Pennsylvania Health Department's refusal to treat abortion clinics as ambulatory surgical facilities.

But even if DOH's position with respect to whether abortion clinics are ASFs were reasonable – which it is not – that interpretation would not excuse the department's abdication of its duty to afford women who go to these clinics the same types of safeguards that plastic surgery patients receive. This is because – whether a facility is called an ambulatory surgical facility, a hospital, or a freestanding abortion clinic – the legislature with the Abortion Control Act has charged DOH with the duty to write and enforce regulations that protect the health and safety of women undergoing abortion procedures.

DOH's position is that one subsection of the abortion regulations – 28 Pa. Code §29.33 – contains all of the rules necessary to ensure that women will be protected. But patients at any other ASF are protected by 30 pages of rules and regulations. 28 Pa. Code §§ 51.1 et seq. Gosnell's clinic, which operated for decades with impunity, constitutes more than sufficient proof that one subsection of regulations, without monitoring, licensing, or inspections, offers inadequate protection.

Given that DOH is capable of writing and enforcing regulations that are comprehensive and enforceable, such as those governing ASFs, we question whether DOH officials have even tried over the decades to protect women who go to clinics for abortion procedures. The ASF regulations, for example, require that patients undergoing every other kind of ambulatory surgery be monitored with high-tech equipment while under anesthesia. The abortion regulations, on the other hand, require that the facility have the high-tech equipment, but do not require that it be used (28 Pa. Code § 29.33(1) and (2)). There is not a single provision in the abortion regulations relating to infection control (nothing to prohibit Gosnell from eating cereal while doing procedures, for example, or from reusing single-use instruments, or from allowing sick, flea-infested cats in the procedure rooms), whereas several pages of rules cover infection control at ASFs.

Most importantly, the abortion regulations include no requirement for DOH ever to inspect or monitor abortion providers. The Grand Jury was astonished to discover that abortion clinics in Pennsylvania, unlike any

other health care facility, are apparently supposed to operate on the honor system.

Many abortion clinics deliver quality care because that is their mission. But what if a particular doctor's mission is to maximize profits by cutting corners? He may hire unqualified staff, reuse instruments, administer expired drugs, tolerate unsanitary facilities, and use obsolete and broken equipment – until one or more of his patients dies. Then, *after law enforcement gets involved*, DOH might take action.

This is what happened in Gosnell's case. It is not a workable system for regulating health care facilities that perform one of the most common surgical procedures, or for assuring safe medical care for the women of Pennsylvania.

Section VIII: Recommendations

This Grand Jury's responsibilities are not limited to recommending criminal charges against those directly responsible for the death of Karnamaya Mongar, the killing of babies born alive, and other criminal activity at the Women's Medical Society clinic. The jurors assume, as well, the task of proposing institutional and legal reforms – to address the systematic flaws exemplified by this case, and to reduce the likelihood that similar crimes will recur.

4. The Abortion Control Act should be amended to prohibit the mutilation of fetal remains.

One of the most bizarre things about this case is Dr. Gosnell's fetal foot collection. He cut the feet off the fetuses he aborted and kept them in a row of jars. No civilized society can accept such an abomination, whether the fetuses in question were viable or not. Although current law prohibits abuse of corpse, there may be some question about how that law applies in the case of fetal remains.

To remove any such question, we recommend an amendment to the Abortion Control Act. The act contains a provision addressing fetal experimentation. Criminal penalties are provided, however, only for "experimentation" on a fetus that is as yet unborn, or on a fetus that is born alive. We believe that the statute should be changed to prohibit the mutilation of any fetal remains, whether or not viable or born alive.

5. The Pennsylvania Department of Health should license abortion clinics as ambulatory surgical facilities.

Under the plain language of the Health Care Facilities Act, abortion clinics should be regulated, licensed, and monitored as Ambulatory Surgical Facilities. Had the state Department of Health not inexplicably declined to classify abortion clinics as ASFs, Gosnell's clinic would have been subject to yearly inspection and licensing.

The department's inspectors could have inspected at any time, announced or unannounced, to investigate any complaints. The sight of unlicensed employees sedating

patients in Gosnell's absence would presumably have triggered action. Given the clinic's filthy conditions, it surely would have been shut down long ago if DOH had merely taken a look.

The regulations for Pennsylvania's ambulatory surgical facilities – which run over 30 pages – provide a comprehensive set of rules and procedures to assure overall quality of care at such facilities. The effect of the Department of Health's reluctance to treat abortion clinics as ASFs was to accord patients of those facilities far less protection than patients seeking, for example, liposuction or a colonoscopy.

Those clinics, unlike abortion facilities, must implement measures for infection control (28 Pa. Code. §567.3 lists 17 specific procedures that ASFs must follow to control infection). They must use sterile linens (§567.21-24). They must keep premises and equipment clean and free of vermin, insects, rodents, and litter (§567.31). The regulations devote three pages to anesthesia protocols (28 Pa. Code §555.33).

Gosnell's facility fell far below the basic, minimum standards of care that any patient having a surgical procedure should expect to receive. There is no justification for denying abortion patients the protections available to every other patient of an ambulatory surgical facility, and no reason to exempt abortion clinics from meeting these standards.

The inspection of abortion facilities is too important a responsibility to be left to the discretion of the Department of Health, subject to the whim of bureaucrats and lawyers who have abdicated their duty to uphold the law.

As ASFs, abortion providers would be subject to mandatory annual inspections. If a facility failed to meet the standards required for all ambulatory surgical facilities, it would lose its license.